Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

KENNETH D. SANDSTAD,

Petitioner,

v.

CB RICHARDS ELLIS, INC.

Defendant.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the Age Discrimination in Employment Act, is "direct evidence" evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic, and if not, does "direct evidence" require a confession?

2. When the Court used the term "disinterested witnesses" in *Reeves v. Sanderson Plumbing Products*, Inc., 530 U.S. 133, 147 L.Ed.2d 105, 151 (2000) did it mean that a disinterested witness is someone other than an interested witness and that an interested witness includes managers or agents involved in the employment decision?

3. In considering whether to grant judgment as a matter of law under Fed. R. Civ. P. 56, in indirect discrimination cases, may the district court determine the credibility of an employer's explanation of the discharge as held by the Seventh Circuit in 1994 and the Fifth Circuit in 2002, or is such determination prohibited by this Court in Reeves in 2000?

LIST OF PARTIES AND RULE 29.6 LIST

The parties before the Court of Appeals and this Court are listed below: To Petitioner's knowledge CB Richard Ellis, Inc. has no parent companies or nonwholly owned subsidiaries.

Kenneth D. Sandstad	Plaintiff/Petitioner
Hal K. Gillespie	Attorney for Plaintiff-Petitioner
CB Richard Ellis, Inc.	Defendant/Respondent
Bryan C. Collins	Attorney for Defendant/Respondent

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PETITION FOR A WRIT OF CERTIORARI

Kenneth D. Sandstad prays for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on October 28, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 309 F.3d 893 (5th Cir. 2002), and a copy is contained in the Appendix attached hereto. A copy of the memorandum order of the United States District Court for the Northern Division of Texas is contained in the Appendix attached hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendering judgment. The decision for which review is sought was entered on October 28, 2002. Pursuant to this Court's Rule 13.1, this petition for writ of certiorari is timely because it is being filed within ninety days after entry of judgment.

STATUTE INVOLVED

The statute construed is the Age Discrimination in Employment Act (the ADEA), 29 U.S.C. § 623(a) which states: "It shall be unlawful for an employer—(1) . . . to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age . . . ."

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

Sandstad filed his ADEA Complaint and Jury Demand on October 14, 1999. In June 2001, the district court granted CBRE summary judgment and dismissed Sandstad's claims. Sandstad timely appealed to the United States Court of Appeals for the Fifth Circuit. Following oral argument, a three-judge panel of the Fifth Circuit affirmed the judgment of the district court.

The district court had jurisdiction over Sandstad's claims under the ADEA, 29 U.S.C. § 626(c) and 28 U.S.C. § 1331 (general federal question jurisdiction).

B. Factual Background

Sandstad was born on May 22, 1946. Sandstad began working for CBRE in July, 1974 as a sales manager in CBRE's Minneapolis/St. Paul office. In 1979 he became Vice President and Resident Manager of the Minneapolis/St.

Paul office. In 1984, CBRE promoted Sandstad to First Vice President and Resident Manager of the North Dallas office in Texas. In 1986, CBRE promoted Sandstad to South Central Regional Manager, Brokerage Services.

In 1990 Sandstad became Central Division Manager over Brokerage Services, reporting directly to the President of Brokerage Services, Gary Beban. Sandstad reported to Beban from 1990 until September 1997, except for a period of less than one year in late 1994 and part of 1995, when he reported to Dick Clotfelter as the National Focus Client Leader for Institutional Services. In late 1995, Clotfelter gave Sandstad a poor performance review.

In 1996, Sandstad returned to the Brokerage Services as the Eastern Division Manager, again reporting to Beban. As the Eastern Division Manager, Sandstad was responsible for about half the country, more than 1,400 employees, 47 offices, and 18 reporting managers. In 1998 Beban's successor, Brett White, President of Brokerage Services, reorganized the Brokerage Services Company from two divisions (Eastern and Western) to nine smaller regions. Sandstad became South Central Region Manager, responsible for the sales offices in Texas, Oklahoma, Arkansas, Louisiana and New Mexico.

Sandstad's rise in CBRE's management stopped soon after CBRE became a publicly traded company in 1996. As part of the process of going public, CBRE held an Initial Public Offering ("IPO") Roadshow during late October and early November 1996. Prior to the IPO, CBRE predicted potential investor and analyst concerns. CBRE anticipated that investors would be concerned that its management was too old and devised a plan to reduce the age of CBRE executive management—the Long-Term Leadership Orientation Program ("the Plan"). The Plan was expressly designed to replace older CBRE executives with younger persons.

CBRE's preparations were astute. During the Roadshow, Walter Stafford, CBRE's Senior Executive Vice President and General Counsel heard stock analysts express their concerns that there was "too much grey hair" among CBRE's senior managers. Stafford told other senior managers about these statements and stated that something would have to be done to remedy the analysts' perception.

In an October 1, 1996 memo, Didion stated the "Purpose" of the Plan was: "To identify and orient promising and committed young managers for long-term leadership roles within the Company." Didion considered the Plan to be very important, and it represented a major financial commitment to CBRE. Didion stated the Plan's intent in a memo of October 17, 1997:

> The objective [of the Plan] was, and is, to identify 30 to 50 younger managers and management candidates to serve as a pool of talent for promotion to senior management positions over the next 5+ years, ultimately replacing current senior management.

CBRE instituted two sessions under the Plan. Didion was responsible for the first session, which began in late 1996. White, one of the "young" managers who participated in the first Plan session, was responsible for running the second session. Didion is the undisputed decisionmaker with respect to the promotion of the younger White (instead of Sandstad) to President of Brokerage Service. White is the decisionmaker on Sandstad's termination.

With the Plan in place, CBRE did reduce the age of its executive management. CBRE chose "younger" managers to participate in the Plan, and promoted several of them to senior management soon after their participation. In late 1996, CBRE chose 14 persons to participate in the first session. The average age of those 14 individuals was 38.8. As of September 1996, the average age of then existing senior

management was 54.8. CBRE chose twelve individuals to participate in the second session. The average age of that group was 40.6. The average age of CBRE's senior management team as of September 1997 was 52 years old. In 1998, the average age of senior management dropped to 48.75.

In 1997 Beban left his position as President of Brokerage Services. In July 1997, CBRE promoted White, then 37, to Beban's position instead of Sandstad, age 51. Sandstad was clearly better qualified for the position of President of Brokerage Services than White. As Eastern District Manager, Sandstad had performed many of the duties he would have performed as President, assisted Beban in making many decisions and per Beban had exhibited "oustandingly strong" performance throughout that time.

Immediately after Didion's decision to promote White, Sandstad talked to Beban in Chicago. Beban told Sandstad that Didion made the decision to "skip a generation" and promote White to President. Beban also told Sandstad that Didion never considered who was the best or the most qualified person for the position, that he never considered anyone else for the position, that White was not ready for the President position, and that it was decided that Sandstad and George Kallis, the Western Division Manager at the time, would stick around for eighteen months to three years to train White. CBRE's top management unabashedly referred to employees as "old" or "young." CEO Didion always referred to anyone under 50 as young and to anyone over 50 as old. General Counsel Stafford said to President White, "You young guys seldom get it right," and White replied, "You old guys don't always get it right."

About fourteen months later, on September 14, 1998 two in-house CBRE lawyers met with Sandstad in Dallas and told him he was being terminated. Sandstad's direct supervisor, White and Stafford, participated by telephone. CBRE

replaced 52 year old Sandstad with 42 year old Jeff Langdon. White made the final decision to terminate Sandstad. White based that decision, in large part, on Stafford's recommendation.

After Sandstad filed a claim of age discrimination against CBRE, CBRE's proffered reasons for terminating Sandstad were his management style and the risk created by his conduct toward a female manager who had reported to him, Nina Petty. Sandstad produced evidence that these stated reasons were false.

First, CBRE "changed" its reasons for terminating Sandstad. At the termination meeting, Company representatives told Sandstad that Petty's claims of gender discrimination were "considered in the decision but it was not the determining factor." On his Notice of Personnel Action (NOPA) form (before his ADEA claim), CBRE checked the box for "company policy conflict" as the reason for termination. Within a day or two following Sandstad's termination a CBRE representative told Petty that Petty's complaint of gender discrimination was not the cause of Sandstad's termination. Sandstad's interrogatories asked CBRE to state the "exact reason(s)" for Sandstad's termination. Nowhere in response did CBRE indicate it terminated Sandstad because of gender discrimination, or because he put the firm at "substantial legal risk." CBRE stated that it terminated Sandstad because of the way Sandstad treated "managers working in his organization, both women and men."

Second, CBRE essentially admitted Sandstand had a good, not bad, record with respect to proper treatment of female employees. While it is true that an agent of CBRE, a lawyer it hired to investigate Petty's complaint, states that some of Sandstad's actions concerning Petty were inappropriate and (without explaining how) placed CBRE at substantial risk of a jury verdict, this agent cleared Sandstad of any gender

discrimination toward Petty. After CBRE terminated Sandstad, Beban told Sandstad that no person among CBRE's senior management did more to promote and foster a positive environment for women than did Sandstad.

Third, Sandstad offered proof that CBRE tolerates sex discrimination by managers, even when "risk" goes to liability. In 1993, Martha Mogull asserted a claim against CBRE for gender discrimination. Mogull obtained a judgment against CBRE in New Jersey state court in late 1996 for approximately $9 million. None of the managers Mogull accused of having discriminated against her were ever disciplined in any way, much less terminated. Further, some of Langdon's reports (Langdon replaced Sandstad) leveled complaints of age discrimination against Langdon, but he was not terminated. As with Petty complaint about Sandstad, these were not "formal complaints." No complaints were filed with the EEOC.

Fourth, as to the subjective management style reason, Sandstad showed that young Langdon (his replacement) had more severe management performance issues than were allegedly the reason for Sandstad's termination, but he was promoted rather than fired. Also, Sandstad proffered evidence of a lengthy career replete with positive performance evaluations, promotions, and prestigious awards and showed that after his one negative evaluation in 1995, he was again promoted.

REASONS FOR GRANTING THE WRIT

There are two reasons for granting certiorari. First, the Fifth Circuit definition of direct evidence requires confession evidence. The Fifth Circuit definition is at logical odds with the concept of direct evidence recognized in *Price Waterhouse v. Hopkins*, and conflicts with the preponderance

definition applied in other circuits.[1] Second, in *Sandstad* the Fifth Circuit made two rulings, both of which created a split in the circuits and directly departed from this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 L.Ed2d 105, 151 (2000). The Fifth Circuit ruled that the term "disinterested witnesses" used by this Court in *Reeves* does not include managers or agents involved in the employment decision, and thereby created a split in the circuits. Next, the Fifth Circuit ruled that a district court may determine the credibility of an employer's explanation of a discharge, that the court does not defer to the jury.

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS OVER THE DEFINITION OF DIRECT EVIDENCE, THE CONFLICT BETWEEN THE FIFTH CIRCUIT RULE AND *PRICE WATERHOUSE V. HOPKINS* AND THE NEED FOR A WORKABLE DEFINITION

Properly defining "direct evidence" in an employment discrimination case is important for two main reasons. First, direct evidence is one of two basic proof schemes[2] available

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[1] The Court has granted certiorari in *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002) (petition for cert granted, January 10, 2003, Docket No. 02-679) where the Ninth Circuit ruled that direct evidence, under a substantial evidence or preponderence definition, is not required for a mixed motive jury instruction. *Costa* may decide the appropriate standards for lower courts to follow in making a direct evidence determination in mixed motive cases.

[2] The Eleventh Circuit in *Wright v. Southland Corporation*, 187 F.3d 1287, 1293, fn. 8 (11th Cir. 1999) observed that a third method of proving discriminatory treatment, statistical proof of a pattern of discrimination, may be a separate and distinct method of proving discriminatory treatment. *Id.* at 1293, fn. 8. Both the district and appeals court in *Sandstad* dismissed as insignificant Petitioner's evidence that the Plan was in place with an express purpose of replacing older managers with younger managers and CBRE reduced the average age of its senior

to a plaintiff. As the Court explained in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed 2d 207, 256 (1981), after an employment discrimination claimant makes a *prima facie* case and the defendant meets its burden of production by presenting a legitimate, non-discriminatory reason, the plaintiff retains the burden of persuading the court that he "has been a victim of intentional discrimination." *Id.* The plaintiff "may succeed in this either *directly* by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* (emphasis added)(citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 1825-26 (1973). Thus, direct evidence obviates the need for a pretext analysis under *McDonnell Douglas*. The panel in *Sandstad* recognized this point, stating it would apply the *McDonnell Douglas* burden shifting analysis "[b]ecause Appellant's case consists of circumstantial evidence." *Sandstad*, 309 F.3d at 898. As explained by the Eleventh Circuit in *Wright v. Southland Corporation*, 187 F.3d 1287, 1293:

> The importance of properly defining "direct evidence" arises from our repeated statements that when a plaintiff has direct evidence of illegal discrimination, he need not make use of the *McDonnell-Douglas* presumption, and conversely, when he does not have such evidence, he is required to rely on the *McDonnell-Douglas* presumption.

The second reason "direct evidence" has an important meaning in employment discrimination is that it may trigger or permit a burden shifting "mixed motive" jury instruction. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L.Ed. 2d

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management team (to which Sandstad belonged) from 54.8 in September 1996 to 48.75 in 1998. This is a remarkable feat, since without additions or subtractions from the senior management team, its average age would have gone from 54.8 to 56.8 in two years.

268 (1989), Justice O'Connor's concurring opinion would permit the use of the mixed motive test only when direct evidence is present. *Id.* at 109 S.Ct. 1775. In this scenario, the burden of persuasion itself may "shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision ... absent consideration of [the protected characteristic]." *Price Waterhouse, supra*, 109 S.Ct. at 1796 (O'Connor, concurring opinion). The Supreme Court has granted certiorari in *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002) (Supreme Court Docket No. 02-679), where the Ninth Circuit ruled that *direct evidence is not required* for a mixed motive jury instruction. If the Court upholds the Ninth Circuit decision, the question of whether there is or is not "direct evidence" will no longer have importance with reference to jury instructions (the Ninth Circuit in *Costa*, holds that the parties are not compelled to invoke the *McDonnell-Douglas* presumption). However, the existence or lack of "direct evidence" will still play its pivotal role in determining whether the plaintiff may avoid summary judgment and submit his case to a jury with direct evidence or must proceed with the *McDonnell-Douglas* pretext proof scheme.

The circuits split as to the definition of "direct evidence." Some circuits require substantial evidence of discriminatory animus to constitute "direct evidence." The Eleventh Circuit in *Wright, supra*, 187 F.3d at 1293 holds:

> "[D]irect evidence," in the context of employment discrimination law, means evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic."

This is the "*preponderance definition*" of direct evidence. *Id.* at 1301. *Wright* contrasted the preponderance definition with the "*dictionary definition,*" which is "evidence, which if believed, proves the existence of a fact in issue without

inference or presumption." *Id.* at 1294. This was the definition in the Eleventh Circuit at the time of the *Wright* decision. The Eleventh Circuit noted the flaw in the dictionary definition:

> The only "eyewitness" to the state of mind of the decisionmaker is the decisionmaker himself. Consequently, the only direct evidence of illegal discrimination under the dictionary definition would be testimony from the decisionmaker that he took an adverse employment action against the plaintiff on the basis of a protected personal characteristic. Any other form of evidence requires at least one inference to reach the conclusion that the employer has impermissibly discriminated.

Id. at 1295 (footnote omitted).

The court in *Wright* also examined Eleventh Circuit precedent. It found that, while the majority of cases stated the dictionary definition of direct evidence, the courts were in practice using the preponderance definition. *Id.* at 1294-1300. "Regardless of the stated definitions of direct evidence in these cases, however, a look at the actual holdings of these cases reveals that they all rely on the preponderance definition." *Id.* at 1294.

This "preponderance definition" is consistent with logic and the use of the term "direct evidence" by Justice O'Connor in *Price Waterhouse.* In her concurring opinion, Justice O'CONNOR set out the "direct evidence" requirement as the necessary threshold for triggering mixed motives analysis. *Price Waterhouse,* 490 U.S. at 276 (O'Connor, J., concurring in judgement). Justice O'Connor stated that the plaintiff must produce "*direct evidence* that an illegitimate criterion was a *substantial factor* in the [employment] decision." *Id.* (Emphasis added.) Justice O'Connor, as well as the plurality of the Court, was concerned that employment discrimination

plaintiffs often cannot pinpoint discrimination as the precise cause of their injury, despite having shown that it played a significant role in the decisional process. Thus, the *Price Waterhouse* burden shifting paradigm was born. *Id.* at 273 (O'Connor, J., concurring opinion). While a dictionary definition of direct evidence effectively requires a confession by the decisionmaker, Justice O'Connor plainly recognized that direct evidence does not require a confession, or even evidence that prohibited discriminatory animus was the sole factor in the adverse employment action. After all, Justice O'Connor was writing about "mixed motive" cases. Thus, a definition that requires "proof of the fact of discriminatory animus without inference or presumption," the Fifth Circuit standard employed in *Sandstad* (309 F.3d at 897), goes far beyond the direct evidence required for a mixed motive instruction.

While the Fifth Circuit has long stated the dictionary definition, in actuality (before *Sandstad*) it has applied the preponderance definition.[3] Before *Sandstad* the Fifth Circuit has often found direct evidence where "no-inference, no-presumption" evidence was missing, where there was no

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[3] *Haun v. Ideal Industries,* Inc., 81 F.3d 541, 545-46 (5th Cir. 1996)(president's instruction to human resources department that he did not want to hire older workers is direct evidence of discriminatory termination of 51 year old plaintiff); *Portis v. First Nat'l Bank of New Albany*, 34 F.3d 325, 327, 329 (5th Cir. 1994)(statement by male supervisor to female plaintiff that she "would never be worth as much as a man to the bank because she was a woman" is direct evidence of discrimination; statement is evidence of corporate culture that made gender a motivating factor in plaintiff's termination); *Brown v. East Mississippi Elec. Pwr. Ass'n*, 989 F.2d 858 (5th Cir. 1993)(routine use of racial slurs is direct evidence of discrimination); *Vaughn v. Texaco, Inc.*, 918 F.2d 517 (5th Cir. 1990)(race-based policy of avoiding confrontation with plaintiff, including counseling about work performance, is direct evidence of race discrimination).

admission by the decisionmaker to the effect of, "I fired the plaintiff because she/he was old/black/female."

Sandstad states the dictionary definition (309 F.3d at 897) and applies it where a "preponderance definition," particularly under the summary judgment guidelines set out in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000), would have easily produced a "direct evidence" label requiring denial of the employer's summary judgment motion.

The *Sandstad* panel then discussed three of the four pieces of evidence Sandstad claimed to be direct, and found them to require an inference to be probative of CBRE's discriminatory animus in firing Sandstad, so not "direct." *Id.* at 897-98.[4] As to the "Long Term Leadership Development Plan," which called for the identification and promotion of younger managers to senior management over the next five plus years, "ultimately replacing senior management," the Fifth Circuit weighed the evidence and reasoned that to find the Plan is evidence of age-based animus relevant to Petitioner's termination "requires the inference that senior managers were to be fired to make room for younger trainees, rather than being replaced as they retire, change jobs, or are terminated for performance reasons." *Id.* at 897.

Second, the Fifth Circuit reasoned that "the remarks by stock analysts about 'too much grey hair' in Company management," "cannot demonstrate directly that Appellant was fired because of his age." *Id.* at 898. In a half truth, the

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[4] The Fifth Circuit failed to mention all the direct evidence in what Beban told Sandstad in 1997. It failed to mention that Beban told Sandstad that Didion (who picked White over Sandstad for President of Brokerage Services–and White later fired Sandstad) never considered who was the best or most qualified person for the position, that White was not ready for the President position, and that it was decided that Sandstad and the other (also "old") division manager would stick around for eighteen months to three years to train White.

Fifth Circuit stated these speakers "not only had no part in the decision to terminate Appellant, they were not even employed by the Company." True, they were not employees of by CBRE, but Stafford heard the comments and acted on them, telling other senior managers about the remarks, saying that something would have to be done to remedy the analysts' perception. The Fifth Circuit omits from its analysis[5] the fact that Stafford recommended firing Sandstad.

Third, the Fifth Circuit found that Beban's "skipping a generation" statement was not direct evidence for two reasons. The Fifth Circuit reasoned that Beban was not responsible for Sandstad's termination (ignoring the fact that Beban was quoting Didion, that Didion selected White over Sandstad who then fired Sandstad). Next the Fifth Circuit credited Beban's deposition testimony where he tried to explain away his "skip a generation" quote of Didion, implausibly alibiing that "generation" meant a level of management seniority, and was not a reference to age. *Id.*

The Fifth Circuit's use of the dictionary definition of direct evidence in *Sandstad* illustrates the importance of the question and the wisdom of the Eleventh Circuit's observation that "the general evidentiary rule in federal courts [is] that circumstantial and direct evidence are treated alike." *Wright*, *supra* at 1300. Petitioner respectfully submits that this Court should resolve the split in the circuits and foster the purposes of federal laws against employment discrimination by rejecting the dictionary definition of direct evidence employed by the Fifth Circuit in *Sandstad* and approving the preponderence definition and this reasoning of the Eleventh Circuit:

> If direct evidence were to mean only evidence that proves discrimination without presumption or inference,

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[5] The Fifth Circuit mentioned these facts in its discussion of background facts (*Id.* at 894).

> then we would have created a system in which a plaintiff would be denied the opportunity to recover for employment discrimination despite the fact that he could prove such discrimination by a preponderance of the (circumstantial) evidence.

Wright, supra at 1301.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS AND DEPARTURE FROM THIS COURT'S HOLDING IN *REEVES*.

This Court's landmark decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2997 (2000), unanimously reversed the Fifth Circuit Court of Appeals, ruling, "it is apparent that respondent was not entitled to judgment as a matter of law." *Id.* at 120 S.Ct. 2110. The Court in *Reeves* did not merely reject the "pretext-plus" special rule of the Fifth Circuit that "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." *Id.* at 2108. The Court in *Reeves* also rejected the Fifth Circuit's approach under Rules 50 and 56, F.R.C.P., by ruling that in the judgment as a matter of law and summary judgment process[6] the court should review the record as a whole but may not make credibility determinations or weigh evidence and

> must disregard all evidence favorable to the moving party that the jury is not required to believe. *See Wright & Miller*, 299. That is, the court should give credence to the evidence favoring the non-movant as well as that

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[6] *Reeves* reiterates that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" 120 S.Ct. at 2110, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

> "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses. *Id.* at 300.

Reeves, *supra*, at 2110. The Fifth Circuit in *Sandstad* gutted the plain meaning of two major holdings in *Reeves* and created a split where the Fifth Circuit and one Seventh Circuit panel conflict with every other circuit that has cited *Reeves* in a discrimination case.[7] *Sandstad* (309 F.3d at 898) holds that interested witnesses do not include managers or agents involved in the employment decision and that in indirect discrimination cases, the court (not leaving it to a jury) may determine the credibility of an employer's explanation of the discharge.

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[7] *Compare Sandstad*, 309 F.3d 893, 893; *Traylor v. Brown*, 295 F.3d 783, 791 (7th Cir. 2002); and *Malacara v. City of Madison*, 224 F.3d 727, 731-33 (7th Cir. 2000) (Circuit Judge Williams dissenting, citing *Reeves*, and noting "classic 'he said, she said'" situation where majority credits defendant's self-serving affidavits) *with Fester v. Farmer Bros. Co.*, 49 Fed. Appx. 785, 793 (10th Cir. 2002); *Mickle v. Morin*, 297 F.3d 114, 120 (2d Cir. 2002); *Armour v. The County of Beaver, Penn.*, 271 F.3d 417, 420 (3d Cir. 2001); *White v. Burlington Northern & Santa Fe Rwy. Co.*, 310 F.3d 443, 449 (6th Cir. 2002); *Equal Employment Opportunity Commission v. Board of Regents of the Univ. of Wisconsin System*, 288 F.3d 296, 301 (7th Cir. 2002); *Warren v. Prejean*, 301 F.3d 893, 903 (8th Cir. 2002); *Winarto v. Toshiba America Electronics Components, Inc.*, 274 F.3d 1276, 1286-87 (9th Cir. 2001); *Swenson v. Potter*, 271 F.3d 1184, 1199 (9th Cir. 2001). *Cf. Wilcox v. State Farm Mutual Automobile Ins. Co.*, 253 F.3d 1069, 1070-71 (8th Cir. 2001)(expressing opinion that the Court in *Reeves* "was intimating that there are some cases in which uncontroverted testimony from an interested party could be given credence").

A. The Court Should Grant Certiorari Because the Fifth Circuit's Holding that Managers or Agents Involved in the Employment Decision are not Interested Witnesses Creates a Split in the Circuits and a Departure from this Court's Holding in *Reeves*.

Besides creating a split in the circuits (between those that now disregard the testimony of interested witnesses and the Fifth Circuit and one panel of the Seventh Circuit who still consider interested testimony on summary judgment[8]) the Fifth Circuit's ruling in *Sandstad* that the term "interested witnesses" does not include managers or agents involved in the employment decision would render meaningless the Court's words. *Reeves* was an ADEA case. The ADEA prohibits age discrimination by employers (29 U.S.C. § 623(a)) and defines "employer" as

> A person engaged in an industry affecting commerce who has 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year .... ADEA, 29 U.S.C. § 630(b).

The meaning of the Court's words in *Reeves* that permit a court reviewing the record as a whole to give credence to 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from *disinterested witnesses*' (*Reeves* at 2110) is driven by the sentence that comes just before it:

> Thus, although the court should review the record as a whole, it *must* disregard all evidence favorable to the moving party that the jury is not required to believe.

Id. (emphasis added). The jury is not required to believe testimony of an interested witness, and to define "interested

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[8] *See* fn. 7 *supra*.

witness" to exclude the managers and agents of the defendant who are "involved in the employment decision" means that, as a practical matter, there is no such thing as an "interested witness" for purposes of employment discrimination cases. In using the term "disinterested witnesses" in *Reeves*, the Court must have meant something. It could not have meant that a named individual defendant is an interested witness but a manager or agent of the defendant employer is not. After all, under the ADEA (the statute involved in *Reeves*) there is no such thing as a named individual defendant. Besides, this would make nonsense of the rule. After all, the rule is designed to keep a reviewing court from making credibility determinations, weighing the evidence, and drawing legitimate inferences from the facts because these "are jury functions, not those of a judge." *Reeves* at 120 S.Ct. 2110.

Four fact scenarios illustrate the meaning of the Court's words in *Reeves*, and the fact that the Fifth Circuit decision stands that meaning on its head:

1. A manager gives an affidavit (or testifies at deposition) that age played no part in his firing decision, that he fired the plaintiff because the plaintiff stole company funds, that he saw the plaintiff take money from the cash register. There are no other witnesses (except the plaintiff, who denies it) and no corroborating evidence, such as an audit or marked money found in plaintiff's position.

2. The manager says he fired the plaintiff, not because of his age, but because he stole company funds. The employer has testimony from a disinterested witness, a customer who saw the plaintiff take money from the till.

3. The manager says he did not fire the plaintiff because of his age but because the plaintiff called

him an idiot. Plaintiff denies making the statement. There are no witnesses and no tape recording.

4. The manager says he did not fire the plaintiff because of his age, but because plaintiff called him an idiot. Non-supervisory co-workers provide affidavits that they heard this statement by the plaintiff. Plaintiff denies making the statement.

Per *Reeves*, in all the examples the testimony of the interested witness, the manager, may not be considered. In examples 2 and 4, the reviewing court may consider the testimony of disinterested witnesses. The Fifth Circuit in *Sandstad* and a Seventh Circuit panel authorize judges to decide who is telling the truth, the manager or the plaintiff in all four scenarios. As a practical matter, where the Fifth and Seventh Circuit created their special rule to keep open "the possibility of summary judgment *for employers*," a judge probably grants summary judgment in all four scenarios. *Sandstad*, 309 F.3d at 898 (emphasis added), *citing Traylor v. Brown*, 295 F.3d 783 (7th Cir. 2002). *See generally*, Catherine J. Lanctot, The Defendant Lies and the Plaintiff Loses; the Fallacy of the 'Pretext Plus' Rule in Employment Caes, 43 Hst. L.J. 57 (1991).

The Fifth Circuit in *Sandstad* disguises its rejection of the holding in *Reeves* by stating, "Appellant contends that *Reeves* requires us to disregard an interested witness testimony, all testimony by managers involved in the employment decision." *Sandstad*, 309 F.3d at 898. The Fifth Circuit states that it disagrees "with Appellant's interpretation of *Reeves*." *Id.* In fact the panel's disagreement is with this Court, since Sandstad merely pointed out to the Fifth Circuit the unequivocal language of *Reeves*. The Fifth Circuit in *Sandstad* did not suggest anyone who could possibly be an "interested witness," in an employment discrimination case if the managers involved in the employment decision do not fit this definition.

By eliminating managers involved in the employment decision from the definition of "interested witnesses," the Fifth Circuit in *Sandstad* did not merely depart from *Reeves*, it joined with the Seventh Circuit in stating its policy reasons for empowering judges to make credibility determinations of a defendant's explanation of the discharge at issue. The Fifth Circuit in *Sandstad* approvingly quoted another Seventh Circuit decision:

> As the Seventh Circuit noted in *Traylor v. Brown, et al.*, 295 F.3d 783 (7th Cir. 2002) to [hold that the definition of an interested witness can be so broad as to require a court to disregard testimony from a company's agents regarding the company's reasons for discharging an employee] would foreclose the possibility of summary judgment *for employers*, who almost invariably must rely on testimony of their agents to explain why the disputed action was taken.

Sandstad, 309 F.3d at 898 (emphasis added). The candid announcement that the Fifth Circuit (and the Seventh Circuit) want to make credibility determinations to safeguard the possibility of summary judgment for employers is (1) no basis for defying an express holding of this Court and (2) flawed reasoning. The reasoning is flawed as shown by the four fact scenarios above. Specifically, employers certainly may, in appropriate cases, still obtain summary judgment when the courts follow *Reeves* as written. Further, *Reeves* was right on policy grounds. Summary judgment under Rule 56 does not play favorites, regardless of the identities of the movant and the non-movant. Certain rules apply and there is no room for a special class of summary judgment to facilitate summary judgment for employers in employment discrimination cases.

B. The Court Should Grant Certiorari Because the Fifth Circuit's Holding that in Indirect Discrimination Cases, the District Court May Determine the Credibility of an Employer's Explanation of the Discharge Creates a Split in the Circuits and is Contrary to this Court's Holding in *Reeves*.

Writing in the context of a circumstantial evidence (pretext analysis) employment discrimination case, *Reeves* states flatly:

> Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.

In *Sandstad*, the Fifth Circuit disagrees, citing as its authority the Seventh Circuit case of *Futrell v. J.I. Case*, 38 F.3d 342 (7th Cir. 1994). *Sandstad*, 309 F.3d at 898. The full quote from *Futrell* cannot fit side by side with *Reeves*. *Futrell* states:

> We note that in reviewing the sufficiency of the evidence in indirect discrimination cases, *we do not defer to jury verdicts where the credibility of a defendant's explanation of the discharge is at issue simply because juries have the right to judge credibility.* [citing *Perfetti v. First National Bank of Chicago*, 950 F.2d 449, 452 (7th Cir. 1991), *cert. denied*, 505 U.S. 1205 (1992).] If the evidence does not amply support a plaintiff's claim that the defendant's explanation is unworthy of credence, judgment as a matter of law is entirely appropriate.

Futrell, *supra*, 38 F.3d at 346.

This splits the circuits.[9] Moreover, it is a gigantic stretch from the non-movant having the burden to produce evidence

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[9] *See* fn. 7, *supra*.

that amply supports his claim, with the Court free to make credibility decisions concerning a defendant's explanation (*Futrell*, 38 F.3d at 346, endorsed by the Fifth Circuit in *Sandstad*, 309 F.3d 898), to *Reeves*, an indirect discrimination case. *Reeves* cautioned that while a court should review all the evidence in the record, it "must draw all reasonable inferences in favor of the non-moving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 120 S.Ct. at 2110. This Court should grant certiorari to resolve the split in the Circuit and to insure that *Reeves* is still good law in the Fifth Circuit.

CONCLUSION

For all the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

[Filed Oct. 28, 2002]

No. 01-10808

KENNETH D. SANDSTAD,
Plaintiff-Appellant,

v.

CB RICHARD ELLIS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas.

Before DUHÉ, DeMOSS and CLEMENT, *Circuit Judges.*

DUHÉ, *Circuit Judge*:

Plaintiff-Appellant Kenneth Sandstad appeals from the district court's order granting Defendant-Appellee C.B. Richard Ellis, Inc. summary judgment on Sandstad's Age Discrimination in Employment Act claim. Because Appellant has not produced evidence sufficient to create an issue for the jury as to pretext, we AFFIRM.

I. BACKGROUND

Sandstad ("Appellant") began his career with C.B. Richard Ellis ("Appellee" or the "Company"), a real estate services company, as sales manager of the Minneapolis office in 1974. Over the next 16 years he was promoted to Vice President and Resident Manager of the Minneapolis office, First Vice President and Resident Manager of the North Dallas

office, and South Central Regional Manager of the Brokerage Business Unit.

The Brokerage Business Unit was organized in three divisions, and in 1990, Appellant became Central Division Manager. He reported directly to then President of Brokerage Services Gary Beban ("Beban") until the end of 1994, when his Division was eliminated and he became Senior Executive Vice President of Institutional Services. This was also an upper management position, and Appellant reported to Dick Clotfelter ("Clotfelter"). In late 1995, Clotfelter gave Appellant a poor performance review, questioning his management and noting his failure to focus on essential tasks. In 1996, Appellant returned to the Brokerage Business Unit as Eastern Division Manager, again reporting to Beban.

Beginning in 1996, the Company designed and implemented a Long-Term Leadership Orientation Program (the "Plan") to integrate younger employees into senior management. A 1997 memo issued by then CEO James Didion ("Didion") described the Plan as one to "identify 30 to 50 younger managers and management candidates to serve as a pool of talent for promotion to senior management over the next 5+ years, ultimately replacing senior management." Brett White, who eventually replaced Gary Beban as President of Brokerage Services and who terminated Appellant, was a participant of this program.

Appellee became a publicly traded company in late 1996. Appellee prepared question-and-answer literature for road shows held in anticipation of the public offering.[1] The literature described the Company's plan to integrate younger employees into management. During the road shows, stock

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[1] "Road show. A series of presentations to investors describing an upcoming issue of securities. A road show is designed to drum up interest in the issue among potential investors." DAVID L. SCOTT, WALL STREET WORDS 326 (Revised ed. 1997).

analysts remarked to Company representatives that there was "too much grey hair" in senior management. Among the representatives who heard these comments was Walter Stafford, senior manager and General Counsel for the Company. Stafford told other senior managers about the remarks and stated that something would have to be done to remedy the analysts' perception. Stafford was among the managers who later decided to fire Appellant.

In 1997, Beban moved from President of Brokerage Services to President of Corporate Services. Appellant was in line to fill the vacancy left by Beban; however, CEO James Didion instead selected Brett White, who was 37 years old at the time he was promoted. Beban told Appellant that Didion had decided to "skip a generation" in selecting Beban's replacement.

In early 1998 the Brokerage Business Unit was reorganized from three divisions into nine regions. Appellant was assigned the lead management role in the South Central Region. Soon thereafter, two managers who reported directly to Appellant registered their frustration with Appellant's management. In July 1998, White, in his role as President of Brokerage Services, gave Appellant's management of the Dallas market a negative review. The next month, Nina Petty ("Petty"), a manager who reported directly to Appellant, filed a formal written complaint of gender discrimination against Appellant.

Appellee hired Rogge Dunn ("Dunn") as outside counsel to investigate Petty's complaint. Dunn interviewed Appellant, Petty, and other employees in Appellant's region, and compiled a report that included summaries of the interviews he conducted. Dunn reported that employees complained about Appellant's conduct and management style generally. His own impression of Appellant was that Appellant was a "bully," was condescending, and was not credible during his interview. Dunn concluded that while he thought Appellant

had not discriminated against Petty, Appellant's actions with regard to Petty were nonetheless inappropriate and placed Appellee at substantial risk of a jury verdict.

Walter Stafford, after meeting with senior managers Ray Wirta and James Didion, recommended Appellant's discharge to White. White conferred briefly with the Company's legal department and discharged Appellant shortly thereafter. White told Appellant that the reasons were poor performance and lost confidence in his leadership. At the time, Appellant was age 52. The region under Appellant's direction was combined with a region managed by Jeff Langdon, age 42.

White issued a memorandum announcing the discharge to the employees in Appellant's region. The memorandum described the reason as lost confidence in Appellant's ability to perform following the investigation prompted by agender discrimination complaint lodged against Appellant.

Appellant sued under the Age Discrimination in Employment Act and timely appealed the adverse grant of summary judgment.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Pratt v. City of Houston, Tex.*, 247 F.3d 601, 605-06 (5th Cir.2001). Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). An issue of material fact is genuine if a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In reviewing the evidence, we must draw all reasonable inferences in favor of the nonmoving party, and avoid credibility determinations

and weighing of the evidence. *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000). In so doing, we must disregard all evidence favorable to the moving party that the jury is not required to believe. *Reeves*, 120 S.Ct. at 2110.

III. ANALYTICAL FRAMEWORK FOR ADEA CASES

In employment discrimination cases, a plaintiff may present his case by direct or circumstantial evidence, or both. *Russell v. McKinney Hospital Venture*, 235 F.3d 219, 222 (5th Cir.2000). If the plaintiff produces direct evidence that discriminatory animus played a role in the decision at issue, the burden of persuasion shifts to the defendant, who must prove that it would have taken the same action regardless of discriminatory animus. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252_53, 109 S.Ct. 1775, 1792, 104 L.Ed.2d 268 (1989). If the plaintiff produces only circumstantial evidence of discrimination, the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) guides our inquiry.[2]

The McDonnell Douglas framework first requires satisfaction of the prima facie case, the elements of which, in the context of age discrimination, are: (1) the plaintiff was discharged; (2) he was qualified for the position at issue; (3) he was within the protected class; and (4) he was replaced by someone younger or outside the protected group. *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 654 (5th Cir.1996). Upon plaintiff's satisfaction of the prima facie case, the burden of production, rather than persuasion, shifts to the defendant to proffer a legitimate nondiscriminatory reason for its decision. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817; *Tex.*

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[2] This circuit applies the *McDonnell Douglas* rubric to both Title VII and ADEA claims. *See Russell v. McKinney Hospital Venture*, 235 F.3d 219, 222 n. 3 (5th Cir.2000).

Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255_56, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). If the defendant meets its burden, the presumption of discrimination created by the prima facie case disappears, and the plaintiff is left with the ultimate burden of proving discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511_12, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

The plaintiff may meet its ultimate burden with evidence tending to show that the reason offered by the defendant is a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 804, 93 S.Ct. at 1825. Evidence demonstrating the falsity of the defendant's explanation, taken together with the prima facie case, is likely to support an inference of discrimination even without further evidence of defendant's true motive. *Reeves*, 530 U.S. at 147-48, 120 S.Ct. at 2108-09. Thus, the plaintiff can survive summary judgment by producing evidence that creates a jury issue as to the employer's discriminatory animus or the falsity of the employer's legitimate nondiscriminatory explanation.[3]

IV. APPLICATION OF ANALYTICAL FRAMEWORK

Appellant urges that the district court erred in finding that he offered no direct evidence of Appellee's discriminatory motive in terminating him. We agree with the district court. Direct evidence is evidence that, if believed, proves the fact of discriminatory animus without inference or presumption.

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[3] The district court quoted *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir.1994), for the proposition that the plaintiff's burden of establishing pretext is "a heavy one indeed. It is not discharged by general avowals of belief, however sincere, that age—rather than an established adequate reason—was the real reason for the termination." Appellant protests that the language quoted by the district court indicates that it applied the "pretext-plus" standard rejected in *Reeves*. Our holding does not rely on the notion of Appellant's burden being a heavy one. In accordance with *Reeves*, we look only to whether a reasonable jury could find that Appellant's evidence supports an inference of age discrimination.

Mooney v. Aramco Services Co., 54 F.3d 1207, 1217 (5th Cir.1995). Appellant points to the Long Term Leadership Development Plan, which endeavored to "identify ... younger managers . . . for promotion to senior management over the next 5+ years, ultimately replacing senior management." To find that the plan is evidence of age-based animus relevant to Appellant's termination requires the inference that senior managers were to be fired to make room for younger trainees, rather than being replaced as they retire, change jobs, or are terminated for performance reasons.[4] Appellant contends that the district court erroneously failed to draw this inference in his favor. However, Appellant's contention is inapposite to the analysis of whether evidence is direct or circumstantial. If an inference is required for the evidence to be probative as to Appellee's discriminatory animus in firing Appellant, the evidence is circumstantial, not direct.

Next, Appellant offers the remarks by stock analysts about "too much grey hair" in Company management. This evidence cannot demonstrate directly that Appellant was fired because of his age. The speakers not only had no part in the decision to terminate Appellant, they were not even employed by the Company. Gary Beban's "skipping a generation" comment similarly is not direct evidence. First, Beban was not responsible for Appellant's termination. Second, Beban in his deposition testimony indicated that he meant "generation" in the context of levels of management seniority, not age. The ambiguity of the remark, as well as its attenuation from Appellant's termination, excludes it from the realm of direct evidence.

Because Appellant's case consists of circumstantial evidence, we apply the *McDonnell Douglas* burden_shifting

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[4] Our discussion of the reasonableness of the required inference is reserved until we discuss whether Appellant has produced evidence allowing for the inference of pretext, *infra*.

analysis. Appellee argues that Appellant failed to make out a prima facie case because Appellee restructured its divisions rather than replacing Appellant per se. The region formerly under Appellant's direction was collapsed into a region managed by 42-year-old Jeff Langdon. As did the district court, we will view, without deciding, Appellant's evidence as establishing a prima facie case. The burden then shifts to Appellee to produce a legitimate nondiscriminatory reason for terminating Appellant.

Appellee's proffered reasons for terminating Appellant were his management style and the risk created by his conduct toward Nina Petty. Evidence in support of Appellant's explanation includes deposition testimony by the managers who fired Appellant or took part in the decision. Appellant contends that *Reeves* requires us to disregard as interested witness testimony all testimony by managers involved in the employment decision.[5] We disagree with Appellant's interpretation of *Reeves*, which would in effect eliminate his burden to show that Appellee's explanation is pretextual. The burden on Appellee to produce a legitimate nondiscriminatory reason for terminating Appellant is "one of production, not persuasion; it can involve no credibility assessment." *Reeves*, 530 U.S. at 142, 120 S.Ct. at 2106; *See also Rios v. Rossotti*, 252 F.3d 375 (5th Cir.2001) (same); *Futrell v. J.I. Case*, 38 F.3d 342 (7th Cir.1994) ("[I]n indirect discrimination cases, we do not defer to jury verdicts where the credibility of a defendant's explanation of the discharge is at

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[5] "[A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses.' *Id.*, at 300." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 151, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000) (quoting Wright & Miller, *Federal Practice and Procedure* § 2529 (2d ed. 1995)).

issue simply because juries have the exclusive right to judge credibility.") The definition of an interested witness cannot be so broad as to require us to disregard testimony from a company's agents regarding the company's reasons for discharging an employee. As the Seventh Circuit noted in *Traylor v. Brown, et al.*, 295 F.3d 783 (7th Cir.2002), to so hold would foreclose the possibility of summary judgment for employers, who almost invariably must relyon testimony of their agents to explain why the disputed action was taken.

Moreover, the record reveals support other than the testimony of senior managers for Appellee's explanation. In Appellant's deposition and in a memo written by Appellant, he acknowledges calling Nina Petty in during her maternity leave to discuss removing her from a pure management role. Appellant admits that he regrets writing in a memo to Petty that she was regarded as a "mother hen." In a memo to Brett White, Appellant concedes that "the book" on him was that he micro-managed those who reported to him. The record contains memoranda expressing dissatisfaction with Appellant's management style from managers Ran Holman and Jerry Lumsden, both of whom reported to Appellant. The performance review of Appellant by Brett White, written the July before Appellant's September termination, expresses White's concern with the "instability and dissatisfaction" among the management in the Dallas market.

Also supporting Appellee's explanation are the summaries written by Rogge Dunn after he investigated Petty's complaint. While the summaries could not be admitted for their truth, we consider them only for their effect on Appellee's decision. Appellant's assertion that we must assess the truth of the interview summaries to determine Appellee's reasonableness in relying on them does not create a fact issue as to pretext; Appellee is entitled to be unreasonable so long as it does not act with discriminatory animus. If Appellant intends to show that the explanation is so unreasonable that it must

be pretextual, it is Appellant's burden to proffer evidence creating a fact issue regarding reasonableness. Appellant has not done so.

Given Appellee's nondiscriminatory explanation, Appellant must point to evidence creating an issue of fact as to the pretextual nature of the explanation. Merely disputing Appellee's assessment of his performance will not create an issue of fact. *Evans v. City of Houston*, 246 F.3d 344, 355 (5th Cir.2001). The issue at the pretext stage is whether Appellee's reason, even if incorrect, was the real reason for Appellant's termination. *Id.* Thus, Appellant must adduce evidence supporting an inference that Appellee's motive was age_based animus, or at the least, that Appellee's explanation of its motive is false.

In arguing that Appellee's explanation is pretextual, Appellant points to Rogge Dunn's conclusion that Appellant did not discriminate against Petty. However, Appellant fails to note Dunn's additional conclusion that Appellee nonetheless placed the Company at substantial risk of a jury verdict. That Appellant did not discriminate against Petty is insufficient to create an issue of fact regarding whether Appellee fired him because he posed a risk to the Company.

Appellant argues that the oral statements we reject as direct evidence in any event provide evidence of discrimination sufficient to show pretext. Oral statements constitute evidence of discrimination if they indicate age-based animus and the speaker is principally responsible for the plaintiff's firing. *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir.2001) (citing *Reeves*, 530 U.S. at 151, 120 S.Ct. at 2110).[6]

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[6] This court traditionally has applied the four-part test of *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir.1996), to workplace remarks. In *Russell*, a panel of this court chose not to apply the *CSC Logic* test, noting that its harsh application in *Reeves* was unacceptable to the Supreme Court.

The statements offered by Appellant fail in that the speakers were not responsible, primarily or otherwise, for his termination. The comment by Gary Beban that James Didion had "skipped a generation" in choosing Beban's replacement could indicate age-based animus, and we draw that inference in favor of Appellant. However, Beban was not among the managers who made the decision to fire Appellant. Beban's estimation of Dideon's decision_making process in promoting Brett White bears no logical link to the decision to fire Appellant.

The remarks by stock analysts that the Company had "too much grey hair" in management indicate age based animus. However, the link between the speakers, who were not even Company employees, and Appellant's termination is absent. To indicate a connection between the analysts' remarks and his termination, Appellant points out that Walter Stafford, one of the managers responsible for Appellant's firing, was audience to the comments and later expressed concern about them. We have held that a remark may bear a sufficient causal connection to the employment decision if the speaker has such influence over the decision maker that his animus properly may be imputed to the decision maker. *Russell*, 235 F.3d at 226_27, citing *Haas v. ADVO Sys., Inc.*, 168 F.3d 732, 734 n. 1 (5th Cir.1999). These decisions are based in part on principles of agency. *Long v. Eastfield College*, 88 F.3d 300, 306 (5th Cir.1996). We have not held that the remarks of non-employees may be imputed to the decision maker, and the statement at issue here provides no reason to so hold today.

Appellant's only evidence of discriminatory remarks by a decision maker is Stafford's testimony that White said to him,

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Russell, 235 F.3d at 225-26. Because the evidence offered by Appellant would produce the same result under either test, we do not reach whether the *CSC Logic* approach continues to be viable.

"You old guys don't always get it right." Appellant omits from his argument the portion of the exchange which places it in context:

Q: Can you recall any [remarks] specifically?
A: The specifics, no. But, again, they're of the same type: "you old guys don't always get it right."
Q: He has said that?
A: Uh-huh.
Q: When did you hear him say that?
A: After I told him that, "You young guys seldom get it right." [7]

Viewed in context, White's remark provides no evidence of discriminatory animus.

The Plan likewise does not provide evidence of pretext. Favoring Appellant, we accept that the Plan evidences a policy of keeping older employees from advancing to senior management positions. However, the inference that the Plan reflected a policy to fire older managers to make room for younger managers is both unreasonable and contradicted by independent, uncontroverted evidence. Appellant offers the decline in mean age of senior managers as evidence of the Company's age-based animus. Since implementation of the Plan, two senior managers have been fired: Appellant and one other, whom Appellant concedes was not fired because of his age. The record shows that younger employees have been promoted to senior management positions. Thus, the decline in mean age is not attributable to senior managers being fired; it is attributable to younger employees moving into newly created senior management positions.

Even if we infer a general animus toward older people currently occupying senior management positions, Appellant offers no evidence providing for a reasonable inference

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[7] Deposition of Walter Stafford, 6R. Plaintiff's App. 146.

connecting the Plan to his own termination. Appellant argues that the "grey hair" and "generation skipping" comments tie the Plan to his termination. The Plan was in place before the road show; thus, it could not have been enacted in response to the "grey hair" comment. Appellant's argument that we should consider the Plan as being enacted in anticipation of the comments requires an unreasonable inference, which we are not required to make. Similarly, the "generation skipping" comment, spoken in connection with a promotion decision made by someone other than the speaker, can be linked to the Plan and to Appellant's termination only with unreasonable inferences.

We reject also Appellant's argument that he was treated differently from Jeff Langdon, whose management style had been the subject of complaints from subordinates. In discrimination cases, we compare the treatment of other employees whose conduct is "nearly identical" to the plaintiff's conduct and who were treated more favorably than the plaintiff. *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507 (5th Cir.2001). Appellant cannot show that Langdon's conduct was nearly identical because no formal complaint of gender discrimination was filed against Langdon. Thus, as the district court concluded, Appellant's treatment cannot be compared with that of Langdon.

Finally, Appellant points to Appellee's alleged lax attitude toward sexual harassment and discrimination. Appellant's evidence of the Company's attitude is no more than a list of the employees who have made complaints and a judgment against the Company won by one complainant. The record contains no evidence of the substance of the complaints or action taken by the Company that would be probative of the Company's attitude toward sex discrimination. No reasonable inference that the Company acted differently in its response to Appellant can be drawn from evidence in the record.

Viewing the evidence as a whole and drawing all reasonable inferences in Appellant's favor, we find that he has created no issue of material fact regarding the Appellee's discriminatory animus in terminating him. We therefore affirm the judgment of the district court.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

[Filed Jun 4, 2001]

KENNETH D. SANDSTAD,

Plaintiff,

v.

CB RICHARD ELLIS, INC.

Civil Action No. 3-99-CV2352-P

MEMORANDUM OPINION AND ORDER

Now before the Court are the following:

1. Motion for Summary Judgment of CB Richard Ellis, Inc., Brief in Support, and Appendix, all filed on December 5, 2000;

2. Plaintiff Kenneth D. Sandstad's Response in Opposition to Defendant's Motion for Summary Judgment, Brief in Support and Appendix, all filed on December 22, 2000;

3. Plaintiffs Objections to and Motion to Strike Certain Portions of Defendant's Summary Judgment Evidence, filed December 22, 2000;

4. Defendant's Response to Plaintiffs Objections to and Motion to Strike Certain Portions of Defendant's Summary Judgment Evidence filed January 12, 2001;

5. Defendant's Objections to and Motion to Strike Portions of Plaintiff s Evidence in Response to Defendant's

Summary Judgment Motion, and Brief in Support, filed January 19, 2001;

6. Plaintiffs Reply Brief in Support of His Objections to and Motion to Strike Certain Portions of Defendant's Summary Judgment Evidence, filed January 24, 2001;

7. Plaintiffs Response to Defendant's Objections to and Motions to Strike Portions of Plaintiffs Evidence in Response to Defendant's Summary Judgment Motion and Brief in Support, filed on February 8, 2001;

8. Defendant's Reply Brief to Plaintiffs Response to Defendant's Objections to and Motion to Strike Plaintiff' Evidence, filed February 23, 2001;

9. Plaintiff's Submission of Original Signature Page to Supplemental Declaration of Kenneth D. Sandstad, filed March 12, 2001;

10. Plaintiff Kenneth D. Sandstad's Amended and Supplemental Expert Witness Report, filed on March 30, 2001.

For the reasons stated below, Defendant's motion for summary judgment is GRANTED. Because the Court has not relied on the evidence Plaintiff and Defendant object to, it need not consider plaintiffs and defendant's motions to strike evidence.

I. STATEMENT OF FACTS

Defendant CB Richard Ellis, Inc. (hereinafter "CBRE") is a real estate services company that provides services in the commercial real estate industry, including sales and leasing, valuation, consulting, asset services, property management,

facilities management, mortgage banking and investment advisory services.[1]

Plaintiff Kenneth D. Sandstad, born on May 22, 1946, began employment with Defendant in July of 1974. Plaintiff held many and various positions during his tenure at CBRE. These varied positions included: 1) vice president and resident manager of CBRE's Minneapolis/St. Paul office; 2) first vice president and resident manager of CBRE's North Dakota office; 3) South Central Regional manager, Brokerage Services; 4) Central Division manager, brokerage services; 5) National Focus Client Leader; and 6) Eastern Division Manager, Brokerage Services. Plaintiff also held other positions and duties, such as being a Member of the Board of Directors for CB Canada, Member of the Board of Directors for CB Commercial and leading Defendant's Portfolio Services. Defendant fired plaintiff when plaintiff was 52 year old.

Some of the facts pertinent to this lawsuit are as follows: In November of 1995, plaintiff received a negative performance review from Dick Clotfelter, plaintiff's supervisor. This negative review was primarily based on plaintiffs management style, yet apparently did not prevent plaintiff from continuing to "rise" within the company. In November of 1996, defendant became a publicly traded company. As part of this process, defendant held an Initial Public Offering Roadshow in October and November of 1996. In connection with the preparation for the Roadshow, defendant prepared a "Potential Road Show Questions and Answers" for the road show participants. On page 18 of this document, the following potential question and prepared answer appear:

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[1] CBRE was formerly known as CB Commercial Group, Inc. A merger in 1998 resulted in the name change to CBRE. This Court will use CBRE to refer to Defendant and to its predecessor entities.

> Q: Do you have any plans to integrate younger employees into the management team? If so, when?
>
> A: We have a very clear plan to integrate younger employees into the senior management team. As a matter of fact, we have embarked on a long term leadership program with identified people and are consistently training our younger people for assumption of long-term leadership responsibilities.

See Plaintiffs appendix at 344.

Indeed, during the Roadshow, several analysts did comment that they were concerned there was "too much gray hair" among defendant's senior managers. Walter Stafford, a supervisor at CBRE, expressed concern about the analysts' opinions and stated he would have to take action regarding those concerns. Prior to the roadshow, however, defendant had already begun to create a plan called the Long-Term Leadership Orientation Program (the "LDP"). Prior to the Roadshow, in a memorandum dated October 1, 1996, then CEO James Diction, wrote that the purpose of the leadership program was to "identify and orient promising and committed young managers for long-term leadership roles within the company." Diction again wrote in a memo dated October 17, 1997:

> The objective [of the Plan] was, and is, to identify 30 to 50 younger managers and management candidates to serve as a pool of talent for promotion to senior management positions over the next 5+ years, ultimately replacing current senior management.

Plaintiff's appendix at 317, 349.

In early 1998, CBRE eliminated the Eastern and Western Divisions, created nine separate regions and assigned plaintiff to the lead management role in the South Central Region. In March of 1998, Jerry Lumsden, a manager in the Austin

office, sent Brett white, plaintiff's superior, a memorandum detailing Lumsden's frustration with plaintiff's leadership and behavioral style. In May of 1998, white reviewed plaintiff's performance and expressed concerns regarding instability of the management team and under-performance of the Dallas market, which plaintiff oversaw.

In August of 1998, Nina Petty, a female working under plaintiff, filed a formal written complaint of gender discrimination against plaintiff. Defendant hired outside counsel to investigate Petty's claim. This investigation consisted of eight interviews of various employees and a review of selected documents. Plaintiff has objected to these interviews on the basis of double hearsay. CBRE responds that the interview summaries are not hearsay because they are offered to show CBRE's state of mind and to show that CBRE was aware prior to the termination of issues concerning Sandstad's management style. The court agrees. As explained later in this opinion, the issue is not whether Sandstad actually discriminated against Petty, but whether the evidence shows a reasonable basis for CBRE to have believed that Sandstad's conduct placed the company at legal risk. Thus, the interview summaries are offered not for the truth expressed by the employees, but to show that CBRE conducted an investigation and that it had a reasonable basis for believing that Sandstad's conduct placed the company at risk.[2]

The gender discrimination alleged against plaintiff consisted of the following: 1) plaintiff selected a man for a senior management position without interviewing Petty, who had more experience; 2) plaintiff asked Petty to come to the office while she was on maternity leave and informed her she should consider a job in production, rather than management;

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[2] The court notes that it would reach the same decision in this case if the interview summaries are not considered.

3) plaintiff excluded Petty from a team of managers to assist in the redesign of the operations of the South Central Region; 4) plaintiff referred to Petty as "mother hen."

On September 14, 1998, CBRE discharged plaintiff. His superior informed him that his performance had been unacceptable, his management style counter-productive, that he had lost support from his management team and that he had placed the company at great risk by his conduct toward Petty.

III. SUMMARY JUDGMENT STANDARD

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). All evidence and the reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962). The moving party bears the burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial, and of identifying those portions of the record that demonstrate such an absence. Celotex, 477 U.S. at 323.

Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). The party defending against the motion for summary judgment cannot defeat the motion unless he provides specific facts that show the case presents a genuine issue of material fact, such that a reasonable jury might return a verdict in his favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Mere

assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment. *Id.* at 248-50; *Abbot v. Equity Group, Inc., 2* F.3d 613, 619 (5th Cir.1993). In other words, conclusory statements, speculation and unsubstantiated assertions will not suffice to defeat a motion for summary judgment. *Douglass v. United Servs. Auto.* Ass'n, 79 F.3d 1415, 1429 (5th Cir.1996) (*en bane*). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case, and on which he bears the burden of proof at trial, summary judgment must be granted. *Celotex,* 477 U.S. at 322-23.

Finally, the Court has no duty to search the record for triable issues. *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 403 (6th Cir.1992). The Court need only rely on the portions of submitted documents to which the non-moving party directs. *Id.*

IV. DISCUSSION

Age Discrimination Claim

The Age Discrimination in Employment Act ("the ADEA") provides the following:

> (a) It shall be unlawful for an employer—
>
> > (1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age. . . .

29 U.S.C.A. §623 (a)(1) (1999).

Claims brought under the ADEA are subject to the same analytical framework set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and later elaborated upon in St. *Mary s Honor Center v. Hicks*, 509 U.S. 502 (1993). *See O'Connor v. Consolidated*

Coin Caterers Corp., 517 U.S. 308, 311(1996); *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 n.4 (5th Cir.1993).

If the plaintiff can show the employer intentionally violated the ADEA, then he may prevail in an age discrimination lawsuit. The plaintiff may show intentional discrimination either through direct or indirect evidence of discrimination. *Price v. Marathon Cheese Corp.*, 119 F.3d 330, 336 (5th Cir. 1997). Direct evidence is evidence that proves the defendant acted with discriminatory intent, without the need for inference or presumption. *Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1217 (5th Cir.1995). If direct evidence is unavailable to a plaintiff and the plaintiff uses indirect, circumstantial evidence of discrimination, the evidence must be such "as to allow a rational fact finder to make a reasonable inference that age was a determinative reason for the employment decision." *Scott v. University of Mississippi*, 148 F.3d 493, 504 (5th Cir.1998).

To create an inference of discrimination, the plaintiff must first present a prima facie case, which establishes a rebuttable presumption of discrimination. Price, 119 F.3d at 336. To establish a prima facie case of age discrimination, the plaintiff must show that he was "(1) discharged; (2) qualified for the position; (3) within the protected class; and (4) either (i) replaced by someone outside the protected class, (ii) replaced by someone younger, or (iii) otherwise discharged because of his age." *Id.* at 336-37.

Once the plaintiff shows the foregoing, then the defendant must offer a legitimate, nondiscriminatory reason for its decision to discharge plaintiff. *Id.* at 337. If he does so, the burden then shifts to the plaintiff to show by a preponderance of the evidence that the reason proffered by the employer is pretextual. *Id.* To show pretext for unlawful discrimination, the plaintiff cannot simply rely on a subjective belief that discrimination occurred; he must prove "that age actually played a role in and had a determinative influence on the

employer's decision-making process." *Id.* (internal quotations omitted).

1. *Direct Evidence*

Direct evidence in the Fifth Circuit is evidence which proves that the defendant acted with discriminatory animus without any inference or presumption. *Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1217 (5th Cir.1995). If a plaintiff does show direct evidence of discrimination, the burden of proof then shifts to the defendant who must then show by a preponderance of the evidence that the employment decision would have been made regardless of discriminatory intent. If the defendant cannot show this, the employee prevails. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249 (1989); Mooney, 54 F.3d at 1217.

In this case, Sandstad attempts to show direct evidence of discrimination through evidence of age-related remarks. "[R]emarks may serve as sufficient evidence of age discrimination if the offered comments are: 1) age related; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue." *Brown v. CSC Logic, Inc., 82* F.3d 651, 655 (5th Cir.1996). For a remark to be probative of discriminatory intent, it must be "direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was an impermissible factor in the decision to terminate the employer." *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173,1181(5th Cir.1996).

Plaintiff maintains that as a result of the discriminatory comments CB officials received during the IPO roadshow, CB embarked on its plan to replace senior managers with younger managers. The evidence shows that during the roadshow, some attendees commented that "the management team had too much gray hair," that Stafford was concerned

about these comments, that Stafford told plaintiff he would have to deal with these age-related concerns, that CB prepared potential questions and answers regarding the age of CB's senior management,[3] that CB initiated a plan to train younger people for assumption of long-term leadership roles, and that

Diction wrote in a memo:

> The objective [of the Plan] was, and is, to identify 30 to 50 younger managers and management candidates to serve as a pool of talent for promotion to senior management positions over the next 5+ years, ultimately replacing current senior management.

Plaintiffs "direct evidence" is problematic for several reasons. First, the comments made during the IPO roadshow were not made by an individual with authority over the employment decision at issue. The people commenting were not employed by defendant (i.e., they had no legal relationship with defendant) and therefore their remarks cannot be considered as direct evidence of age-related remarks. Moreover, the IPO comments are not proximate in time to the terminations, having been made approximately two years before plaintiff's termination. The evidence also shows the LDP was developed prior to these comments having been made at the roadshow, not subsequent to. Plaintiffs "direct evidence" requires too many inferences and presumntions.

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[3] "We have a very clear plan to integrate younger employees into the senior management team. As a matter of fact, we have embarked on a long-term leadership program with identified people and are consistently training our younger people for assumption of long-term leadership responsibilities." Plaintiffs appendix at 344.

The potential questions prepared by Stafford and the memo written by Diction also do not qualify as "evidence." The questions were prepared approximately two years before plaintiff's termination. The memo was written approximately one year before plaintiff's termination. Again, these comments are not proximate in time to the termination Second; these memos and questions can be interpreted as merely saying defendant needs to train younger employees to replace the older ones once the older managers retire just as easily as they can be interpreted as saying that defendant is trying to "get rid" of older employees. Therefore, this "direct evidence" requires inferences and presumptions that this Court cannot make when it is considering "direct evidence."

Finally, plaintiff attempts to show that because the participants in the LDP were younger than the senior managers, that this is direct evidence of discrimination. However, the purpose of the plan was to train younger employees to eventually replace the older ones - therefore, the fact that the LDP participants were "younger" is no great surprise. Existing senior managers could not be considered as potential participants in the LDP since they are already managers; therefore, this evidence does not qualify as "direct evidence" of age discrimination. Plaintiff also fails to offer any expert evidence that the reduction in the average age of senior management occurred as a result of discrimination against any existing senior managers. Indeed, the evidence shows that only two senior managers have been fired since the four years the LDP Was announced - plaintiff and another man, whom plaintiff admits was fired for making inappropriate comments during a public meeting. *See* defendant's appendix at 2; supplemental appendix at 5-6. The evidence also shows that from September 1995 to September 2000, fifteen new individuals were added to defendant's senior management team in the United States, six participated in the LDP but only one replaced a member of senior management, who, as stated above, was fired for

inappropriate comments. *See* defendant's appendix at 2-3. The other five participants in the LDP either filled newly created positions or replaced an employee who remained a member of senior management, but in a different capacity. *See id.* at 3. The promotion of the six participants from the LDP into senior management did not result in the termination of existing senior management. *See id.* Therefore, the court finds that the implementation of the LDP does not constitute direct evidence of defendant's discrimination against older employees.

2. Indirect Evidence

As previously stated, to establish a prima facie case of age discrimination, plaintiff must show that 1) he was discharged, 2) qualified for the position, 3) within the protected class, 4) replaced by someone outside the protected class, someone younger or he was discharged because of his age. *Russell v. McKinney Hospital Venture, 235* F.3d 219 (5th Cir. 2000).

Only the fourth element is disputed in this case. Plaintiff cites evidence that Langdon, a younger person, took over plaintiffs responsibilities. *See* plaintiffs appendix at 549, 416-417, 367-368, 433-434 and 446-447. Defendant cites evidence that Langdon did not replace plaintiff but that Defendant combined the South Central Region and the Inter-Mountain Region and when this consolidation took place plaintiff wasn't replaced by Langdon, but simply the leadership of the regions was consolidated. *See* plaintiffs appendix at 417.

For summary judgment purposes, the court will presume that plaintiff did establish a prima facie case since the evidence must be viewed in a light most favorable to the plaintiff. Assuming, then, that plaintiff did establish a prima facie case, defendant is nevertheless entitled to summary judgment because defendant offered a legitimate, nondiscriminatory reason for plaintiff's discharge: White,

plaintiff's superior, lost confidence in plaintiff's ability to perform his duties as the South Central Region Manager.

The evidence shows that the loss of confidence was based on two factors: the situation with Nina Petty and plaintiff's management style. Nina Petty was a female employee who filed a complaint with the company against plaintiff for gender discrimination. The evidence shows that defendant feared that plaintiffs actions towards Petty exposed the company to substantial legal risk. This is a legitimate, nondiscriminatory reason for discharging plaintiff.

Plaintiff maintains that these reasons are pretextual. Pretext is shown by admissible evidence of specific facts showing the employer's reason is contrived. *Berg v. Bruce,* 112 F.3d 322, 327 (8th Cir.1997). "[T]he burden of establishing [the nondiscriminatory reasons] as pretextual is a heavy one indeed. It is no discharged by general avowals of belief, however sincere [discrimination] rather than an established aquate reason-was the real reason for the termination." *Gizzle v. Health Network, Inc.* 3d 261, 268 (5th Cir.1994.

Plaintiff first argues that because he did not actually discriminate against Petty, that defendant's reason is pretextual. However, whether plaintiff actually discriminated against Petty, is not the issue. Even assuming that plaintiff did not discriminate against Petty does not answer the question of whether CBRE had a reasonable belief that Sandstad's conduct had exposed the company to significant legal risk. The undisputed fact remains that Petty filed a complaint with defendant against plaintiff for gender discrimination. Moreover, the evidence supports defendant's claim that following an investigation, defendant feared legal exposure due to this complaint. It is sufficient that the defendant reasonably believed the complaint exposed it to legal liability. "Even an incorrect belief that an employee's performance is inadequate constitutes a legitimate, non-discriminatory reason. We do not try in court the validity of good faith belief

as to an employee's competence. Motive is the issue." *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991). Plaintiff maintains that because defendant reasonably believed the complaint exposed it to legal liability. "Even an incorrect belief that an employee's performance is inadequate constitutes a legitimate, non-discriminatory reason. We do not try in court the validity of good faith belief as to an employee's competence. Motive is the issue." *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir.1991). Plaintiff maintains that because defendant's outside investigator, Rogge Dunne, did not believe that Sandstad discriminated against Petty, defendant could not really have believed that plaintiff discriminated against Petty. However, Mr. Dunne also informed *CBRE that* he believed Petty would likely prevail if she filed suit against the defendant. Thus, CBRE had a reasonable basis for its belief that plaintiffs conduct toward's Petty placed the company in a position of substantial legal risk.

Second, 'plaintiff states that defendant's reason is pretextual because defendant tolerated sex discrimination. Plaintiff shows no evidence of defendant's tolerance of sex discrimination other than to refer the court to a judgment obtained against defendant for sex discrimination. This judgment, wholly unrelated to this case, is not evidence that the reason given in this case is a pretext. Moreover, plaintiff asserts that there were 13 complaints of gender discrimination against managers within the company and only two were fired because of those complaints. This assertion is equally ineffectual as evidence of pretext because plaintiff does not present evidence to show whether or not defendant considered that the other complaints placed the company at Substantial legal risk, as it did in this case.

Finally, plaintiff maintains that defendant's change in its rationale for termination is further evidence of pretext. Plaintiff asserts that in the Notice of Personnel Action

("NOPA") and White's accompanying memo, in response to Sandstad's interrogatories, in the meeting in which Sandstad was terminated, and in the reasons given to Nina Petty defendant never articulated a concern that plaintiff had placed the company at substantial legal risk. The evidence, however, does not support plaintiff's assertion. In the memo accompanying the NOPA, white stated that his decision to terminate plaintiff "was made following a lengthy and thorough investigation of a charge of gender discrimination lodged against Ken by a female employee . . . ." Defendant's answers to Sandstad's interrogatories repeated this statement. Thus, while neither white's memo or the answers to interrogatories used the phrase "placed the company at substantial legal risk", it is apparent that the gender discrimination complaint was a factor in defendant's decision to terminate Sandstad. As plaintiff notes, the memo reflecting what was said at the meeting in which Sandstad was terminated states that Petty's complaint was "considered in the decision but it was not the determining factor." The very next sentence, however, states that Sandstad's actions "were inappropriate and have placed the company at substantial risk if she [Petty] were to bring suit against the company for gender discrimination." Thus, it is apparent that from the beginning CBRE believed that Sandstad's conduct placed it at risk legally. As discussed above, the evidence supports the reasonableness of that belief.

Finally, that in response to a concern expressed by Petty, CBRE told Petty that her complaint had little to do with plaintiff's termination is not sufficient to raise an issue of pretext. In considering the evidence, it becomes apparent that defendant's reasons for terminating plaintiff have not changed and thus provide no evidenced pretext.

With respect to plaintiff's management style plaintiff contends that the evidence does not support defendant's claim of concerns it had with plaintiffs management style prior to

the termination. However, the defendant has presented evidence of concern with plaintiff's management style prior to the September 1998 termination. Plaintiff received a review in 1995 that indicated concerns with his management practices. Plaintiff's 1998 performance review also reflects concerns about plaintiff's management style, and a memo plaintiff wrote to defendant indicated he knew of the complaints regarding his management style.[4] *See* plaintiff's appendix at 271. That White ultimately gave plaintiff good performance reviews does not change the fact that concerns about plaintiffs management style were being voiced well before the termination. Thus, there is sufficient evidence to show that defendant, prior to the termination, had concerns over plaintiffs management style and that it factored into the decision to ultimately terminate plaintiff.

Plaintiff's argument hat there was disparate treatment between him and Jeff Langdon is not viable here his situation was not "nearly identical" to Langdon's. *See Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991). Plaintiff complains that Langdon's managers complained about Langdon's management style and defendant did not fire Langdon. However, this situation is not nearly identical to plaintiff's in that no one lodged a complaint against Langdon for gender discrimination. Therefore, this argument fails.

The Court finds that the plaintiff has failed to present direct evidence of age discrimination and that defendant has rebutted plaintiff's prima facie case by showing a legitimate, nondiscriminatory reason for plaintiff's termination.

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[4] "Brett commented that there were several concerns that had been expressed that are part of the `book' on me:.... concern over hiring mangers who are better lieutenants than leaders.. . spending more time than I should on details." Plaintiffs appendix at 8.

CONCLUSION

Based on the foregoing, the Court is of the opinion that defendant has offered a legitimate, nondiscriminatory reason for plaintiff's termination and defendant's motion for summary judgment should be GRANTED.

So Ordered.

Signed this___day of June, 2001

/s/ Jorge A. Solis
Jorge A. Solis

UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed June 5, 2001]

NO. 3:99-CV-2352-P

KENNETH D. SANDSTAD,

Plaintiff,

v.

CB RICHARD ELLIS, INC.,

Defendant.

FINAL JUDGMENT

Pursuant to the Court's Memorandum Opinion and Order filed June 4, 2001 the Court issues judgment as follows:

It is ORDERED ADJUDGED and DECREED that,

1. Plaintiff Kenneth D. Sandstad, shall take nothing from his claims against defendant CB Richard Ellis, Inc.

2. Accordingly, costs incurred by the defendant, shall be assessed against plaintiff.

TO IS SO ORDERED.

Signed this 5th day of June, 2001 at Dallas, Texas.

/s/ Jorge A. Solis
Jorge A. Solis

UNITED STATES
DISTRICT JUDGE
NORTHERN DISTRICT
OF TEXAS

APPENDIX C

Sec. 621.—Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment

Sec. 622.—Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older

workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631of this title

Sec. 623.–Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a

foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such

actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub. L. 101-239, title VI, Sec. 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof

to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section

1056(a)(3) of this title and section 401(a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preced ing provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the

subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section..[1]

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D) of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer

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[1] So in original.

has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B) (i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section—

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because—

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for—

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42U.S.C. 401 *et seq.*), and that do not exceed such old-age insurance benefits.

(2) (A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii); are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of title 26) that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 *et seq.*);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E) (i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year

for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(B) of this section, it shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because a plan of an institution of higher education (as defined in section 1001 of title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if—

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election

Sec. 624.—Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a) (1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include—

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982

Sec. 625.—Administration

The Secretary shall have the power—

(a) Delegation of functions; appointment of personnel; technical assistance to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

Sec. 626.—Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid

overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or

participate in an investigation or proceeding conducted by the Commission

Sec. 627. - Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter

Sec. 628. - Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest

Sec. 629. - Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: Provided, however, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder

Sec. 630. - Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trust, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or

their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.), or the Railway Labor Act, as amended (45 U.S.C. 151 *et seq.*); or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters

thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401 *et seq.*).

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*).

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan

Sec. 631.—Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633aof this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any

combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made

Sec. 633.—Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one

hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority

Sec. 633a.—Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action

on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on

the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be

subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980

Sec. 634.—Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter

APPENDIX D

Rule 56. Summary Judgment

(a) For Claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by

examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a

continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Supreme Court, U.S.
FILED
MAR 14 2003
OFFICE OF THE CLERK

No. 02-1121

In The

Supreme Court of the United States

KENNETH D. SANDSTAD,

Petitioner,

v.

CB RICHARD ELLIS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court will grant certiorari to consider Petitioner's contention that the Circuit Courts utilize conflicting definitions of direct evidence when the conflict is more semantic than real and when the result in this case, utilizing the direct evidence definition Petitioner proposes, would be the same.

2. Whether this Court will grant certiorari to consider Petitioner's contention that there is a conflict in the Circuit Courts as to the meaning of the "disinterested witnesses" language in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), when the only Circuit Courts to address the issue have been consistent, when there is no conflict in the Circuit Courts, and when the result in this case, even excluding the testimony of managers involved in the discharge decision, as Petitioner urges, would be the same.

3. Whether this Court will grant certiorari to consider Petitioner's contention that the Fifth Circuit ignored the *Reeves* decision of this Court in holding that it is permissible to make credibility determinations when reviewing summary judgment evidence when that was not the holding of the Fifth Circuit and when the Fifth Circuit, in this case, specifically cited *Reeves* for the proposition that it must avoid credibility determinations.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Respondent, CB Richard Ellis, Inc. is wholly owned by CB Richard Ellis Services, Inc., which is not a publicly traded corporation. CB Richard Ellis Services, Inc. is wholly owned by CBRE Holding, Inc., which is not a publicly traded corporation. No publicly held corporations own any stock in CB Richard Ellis, Inc., CB Richard Ellis Services, Inc., or CBRE Holding, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Respondent, CB Richard Ellis, Inc. respectfully requests that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

The District Court's opinion is not reported and may be found in Petitioner's Appendix 15a. The opinion of the Court of Appeals is reported, *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893 (5th Cir. 2002), and may also be found in Petitioner's Appendix 1a.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

PROVISION OF LAW INVOLVED

29 U.S.C. § 623

It shall be unlawful for an employer – (1) to . . . discharge any individual . . . because of such individual's age.

STATEMENT OF THE CASE

A. Factual Background.

Respondent, CB Richard Ellis, Inc. ("CBRE") is a real estate services company that provides a wide range of

services in the commercial real estate industry. (3R.App. 1, ¶ 3)[1] Between 1990 and 1994, Petitioner, Kenneth D. Sandstad ("Sandstad") was the Central Division Manager of the Brokerage Business Unit ("Brokerage") of CBRE, reporting to its President, Gary Beban ("Beban"). (3R.App. 13, 14) (4R.App. 247-48) Brokerage, at that time, was organized along three geographic divisions within the United States. (4R.App. 248-49) In 1994, the Central Division was eliminated in favor of a two-division structure, Eastern and Western (4R.App. 254-55), and Sandstad, at the age of 48, assumed a new position – Senior Executive Vice President of Institutional Services. (4R.App. 242-43) (3R.App. 16)

In that new role, Sandstad reported to Dick Clotfelter ("Clotfelter"), who reported to the CEO James Didion ("Didion"). (4R.App. 243) In late November 1995, Sandstad received a negative performance review from Clotfelter questioning Sandstad's management style and noting his tendency to impose unnecessary work on subordinates and his failure to focus on essential tasks. (3R.App. 50-53, 49) (4R.App. 242) In early 1996, Sandstad returned to a Division Manager (Brokerage) position he had previously held and reported to Beban once again. (3R.App. 17)

Beginning in 1996, CBRE designed and implemented a Long-Term Leadership Orientation Program ("LDP"). (3R.App. 40) In a 1997 memo, Didion described the LDP as a program to "identify 30 to 50 younger managers and management candidates to serve as a pool of talent for

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[1] The evidence submitted by the parties on summary judgment (other than that attached to CBRE's Reply) is not consecutively numbered in the record. Thus, where CBRE refers to evidence it submitted in its Appendix of Summary Judgment Evidence, it will cite to the Record Volume and to the Appendix page of that volume (e.g., "4R.App. [page]").

promotion to senior management over the next 5+ years, ultimately replacing senior management." Brett White ("White"), who eventually replaced Beban as President of Brokerage Services and who terminated Sandstad, was a participant in the LDP.

Sandstad conceded that the purpose of the LDP, in part, was to bring in a group of producers, to expose them to the way the entire Company operated and to management, and to provide a pool of people who in the future could assume senior management positions if necessary. (5R.App. 314) He also conceded this would be a legitimate purpose for such a program. (5R.App. 349) Sandstad, a member of senior management at the time, did not assert that he should have been chosen to participate in the LDP, nor did he assert that there was discrimination in the selection of the individuals who participated in the LDP; rather, he claimed, without explanation, that "younger" managers were chosen to participate in the LDP and then proceeded to discuss, without any supporting expert testimony, the change in the average age of senior management. (Petition 4-5) However, he did not dispute that of the 26 individuals who participated in the LDP, 10 were 40 years of age or older and none were younger than 33 years of age, (3R.App. 2, ¶ 4), that of those 26, only six were subsequently promoted at varying times into senior management positions in the United States and two others were promoted into senior positions outside the United States, (3R.App. 2, ¶ 5), or that almost all of the senior management positions filled by these eight individuals were newly-created positions.[2] (3R.App. 2-3, ¶ 5)

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[2] All of these undisputed facts, including particularly the fact that almost all of the senior management positions filled by LDP participants

(Continued on following page)

In late 1996, after an initial public offering ("IPO"), CBRE became a publicly traded company. (3R.App. 76) In a Q&A document prepared in connection with the public offering, CBRE referenced the LDP and noted that the Company had a very clear plan "to integrate younger employees into the senior management team." (3R.App. 82-85, 95) This Q&A followed a question asking the Company to comment on the depth and experience/average tenure of the senior management team. The answer states that "the average tenure of that group is 27 years in the business and they are some of the most visible, highly competent people in the industry." (3R.App. 82-84, 94)

At one of the IPO road shows, a comment was made by a stock analyst to senior CBRE managers that there was too much gray hair on the management team. (5R.App. 373-74, 379-82) Sandstad testified that Walt Stafford ("Stafford"), CBRE's General Counsel, and Beban relayed to him that the comment was critical of the apparent age of the management team. (4R.App. 312-13) He also testified that Stafford indicated that the Company was going to have to do something about it.[3] (4R.App. 289-90) Sandstad conceded, however, that no one told him what was going to be done. (5R.App. 347)

In 1997, Beban moved from President of Brokerage Services to President of Corporate Services and Didion

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were *newly created positions,* render Petitioner's average age analysis meaningless.

[3] Because the LDP was implemented before the comment by the stock analyst, Petitioner ignores his own testimony about the legitimate purposes of the LDP and speculates, without citing to any evidence, that CBRE anticipated these concerns and implemented the LDP as a "plan" to reduce the age of CBRE executive management. (Petition 3)

selected White as Beban's replacement.[4] Thereafter, the Eastern and Western Divisions of Brokerage were eliminated and nine separate regions were created. (4R.App. 260-61) In January 1998, Sandstad was assigned the lead management role in the South Central Region, reporting to White. (4R.App. 262) Soon thereafter, White met with Sandstad and discussed, among other things, White's understanding that others had responded negatively to the level of detail imposed by Sandstad. (5R.App. 419-20) (4R.App. 309-11) In early March, 1998, White received a memorandum from Jerry Lumsden ("Lumsden"), who managed the Austin office and who reported to Sandstad, detailing Lumsden's frustration and concerns with Sandstad's leadership and behavior style. (3R.App. 151-52) (5R.App. 145-57)

In June, 1998, Sandstad sent White a memorandum detailing various issues within the South Central Region. (5R.App. 443, 450-52) Among other things, Sandstad admitted to White that Ran Holman ("Holman"), who was the Senior Manager in charge of the area which included Dallas/Fort Worth and who reported to Sandstad (5R.App.

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[4] Despite the fact that Petitioner, before the District Court, abandoned his failure to promote claim, he asserts that he was clearly better qualified than White for the position of President of Brokerage Services. (Petition 5) However, the evidence presented to the District Court failed to establish that Sandstad was as qualified as White, much less that he was clearly better qualified than White. Petitioner also asserts that Beban told him that Didion decided to "skip a generation" in promoting White. (Petition 5) Presumably because Beban was not involved in the discharge decision and Didion was, Petitioner represents to this Court that Beban, in making the comment about "generation skipping," was "quoting Didion." (Petition 14) However, Beban was not quoting Didion; rather, he told Sandstad that this is what he perceived Didion was doing. (1R. 148-49) (3R.App. 24-26)

327-28), was exasperated by a number of things and that he was concerned that Holman was ready to quit. (5R.App. 443, 450-52) White then met with Holman in Dallas, (5R.App. 421-25), and later advised Sandstad, by memorandum, that he perceived Holman to be extremely frustrated with the direction of the Dallas Market and his role within it and that the Dallas management team was extremely unstable. (5R.App. 426, 446-47) Thereafter, in July, 1998, White expressed to Sandstad, in writing, his concern about the relative instability and dissatisfaction of some members of Sandstad's management team and gave Sandstad's management of the Dallas market a negative review. (5R.App. 427, 453-55)

One month later, in August, 1998, Nina Petty ("Petty") filed a formal written complaint of gender discrimination against Sandstad. (4R.App. 159-60, 162) At that time, Petty was the Managing Officer of the Fort Worth office reporting directly to Sandstad. (3R.App. 123, 130) Included among Petty's allegations were the following: (1) that Sandstad selected Holman for the senior management position overseeing the Dallas Market without interviewing Petty even though she had more experience than Holman, (5R.App. 369-70, 386-88), (2) that Sandstad asked her to report to the office during her maternity leave and informed her that she should consider a job in production rather than management, (3R.App. 131), (3) that Sandstad excluded Petty from a team of managers to assist in the redesign of the operations of the South Central Region (the "Core Team"), (3R.App. 131), and (4) that Sandstad referred to her as a "mother hen." (3R.App. 138)

Sandstad does not deny that he referred to Petty in a written memorandum as a "mother hen," an action he now regrets. (5R.App. 345-46) He does not dispute the claimed actions and conversation during her maternity leave,

(5R.App. 318-19, 324-25), and he concedes that he had this conversation with Petty despite the fact that the manager to whom Petty reported at that time never told him that Petty was doing a poor job, (5R.App. 326), and despite the fact that there was no documentation of any performance problems with Petty. (5R.App. 326, 329-31) Additionally, Sandstad does not dispute that Petty was a Managing Officer and that he chose not to put Petty on the initial Core Team for the South Central Region even though she had been recommended for that assignment. (5R.App. 317)

The Company hired outside counsel, Rogge Dunn ("Dunn"), to conduct an investigation. Dunn, a Texas attorney who specialized in labor and employment law and who had extensive experience litigating employment disputes on behalf of both employees and employers, (3R.App. 97-98), interviewed Sandstad, Petty, and other employees in Sandstad's region. (3R.App. 102) (5R.App. 389-406) Thereafter, Dunn compiled a report that included summaries of the interviews he conducted. (5R.App. 375-76, 389-406) Dunn reported that employees complained about Sandstad's conduct and management style generally. (5R.App. 391-95) He also communicated his own impression of Sandstad – he concluded that Sandstad was a bully in the workplace, that he was not truthful during the investigation and that he had a bad management style that caused Holman and maybe one or two other people to consider leaving CBRE. (3R.App. 37, 103-05, 109-11, 114) Dunn also reported that while he thought Sandstad had not engaged in conduct rising to the level of Title VII gender discrimination, Sandstad's actions with regard to Petty were nonetheless inappropriate and placed CBRE at substantial risk of a jury verdict. (3R.App. 109-10, 112-13) (4R.App. 196-97)

Stafford, after meeting with Ray Wirta ("Wirta"), then the COO, and with Didion, then the CEO, recommended

Sandstad's discharge to White. (4R.App. 208-09, 178-79) (5R.App. 371-72, 378, 428-30, 460-68, 432) White then conferred with members of CBRE's legal department involved in the investigation and shortly thereafter discharged Sandstad. (5R.App. 430-33) (4R.App. 175-76) At the time he was discharged, Sandstad was told that his performance had been unacceptable, (4R.App. 282-83), that White and other senior managers at CBRE had lost confidence in his leadership, (4R.App. 282) (5R.App. 438-40, 407), and that his actions toward Petty were inappropriate and placed the company at substantial risk if she were to bring suit for gender discrimination. (3R.App. 3-4 ¶ 8) (4R.App. 283)

B. District Court Proceedings.

Sandstad filed the instant suit in the United States District Court for the Northern District of Texas, alleging that he was discharged in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* On December 5, 2000, Respondent filed a motion for summary judgment and on June 5, 2001, the District Court, Hon. Jorge A. Solis, granted summary judgment in favor of Respondent. The Court noted that Sandstad may show intentional discrimination either through direct or indirect evidence of discrimination. (Pet. App. 22a)

Addressing Sandstad's claim that he presented direct evidence of discrimination through age-related remarks, the Court noted that such remarks must be "direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was an impermissible factor in the decision to terminate [Sandstad's employment]"; it also noted that such remarks must be "1) age related; 2) proximate in time to the termination; 3) made by an individual with authority over the employment

decision at issue; and 4) related to the employment decision at issue." (Pet. App. 23a) The Court concluded that remarks by the stock analyst and remarks concerning the purpose of the LDP did not constitute direct evidence that age discrimination motivated Sandstad's discharge almost two years later. Similarly, it concluded that a remark concerning Didion's decision to promote White to President of Brokerage Services was not direct evidence that Sandstad was discharged, more than one year later, because of his age. It reached these conclusions for various reasons, including the fact that the remarks were not proximate in time to Sandstad's discharge, were not made by an individual with authority over the discharge decision, and did not directly and unambiguously indicate that Sandstad or any other member of senior management would be terminated because of his or her age. (Pet. App. 23a-26a)

Turning to Sandstad's claim that he offered indirect evidence of discrimination, the Court presumed that Sandstad had been replaced by a younger employee (thus establishing a *prima facie* case of discrimination) and recognized that CBRE had presented a legitimate nondiscriminatory reason for discharging him – that CBRE's management had lost confidence in his ability to perform his duties as the South Central Region Manager based upon his management style and his actions toward Nina Petty. (Pet. App. 26a-27a) The Court then examined the evidence offered by Sandstad with "reasonable inferences to be drawn therefrom . . . in the light most favorable to [Sandstad]," (Pet. App. 26a), in order to determine if there was any evidence that the reason offered by CBRE was pretextual.

While not disputing that Dunn informed CBRE that he believed Petty would likely prevail if she filed suit for gender discrimination, Sandstad points to Dunn's conclusion that his actions did not rise to the level of a Title VII

violation. The Court concluded that Dunn's position regarding legal liability did not have anything to do with the Company's "reasonable belief that Sandstad's conduct had exposed the Company to significant legal risk," and did not constitute evidence of pretext. (Pet. App. 27a-28a) The Court also rejected, as unreasonable and unsupported, Sandstad's suggestion that CBRE tolerated sex discrimination, and that, therefore, its concern about the legal risk posed by his conduct toward Petty was pretextual.[5] (Pet. App. 28a) Addressing Sandstad's contention that he had been treated differently than a younger manager who had also been the subject of complaints, the Court found no evidence of pretext because the complaints directed at the younger manager were not sufficiently similar to draw any probative comparisons. (Pet. App. 30a) Addressing Sandstad's final pretext argument – that CBRE offered different reasons for terminating him – the District Court considered the evidence and found that "Defendant's reasons for terminating Plaintiff have not changed and thus provide no evidence of pretext." (Pet. App. 28a-29a)

C. Court of Appeals' Proceedings.

In *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893 (5th Cir. 2002), the Fifth Circuit affirmed the decision of the District Court. The Fifth Circuit recognized that "[i]n accordance with *Reeves* we look only to whether a reasonable jury could find that [Sandstad's] evidence supports an

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[5] The Court noted that, absent other evidence [and there was none], the mere fact that there had been a judgment against CBRE for gender discrimination and thirteen complaints of gender discrimination [over a seven-year period] does not suggest that CBRE tolerated sex discrimination. (Pet. App. 28a)

inference of age discrimination." (Pet. App. 6a n.3) (citing *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000)). In rejecting Sandstad's claim that he had presented direct evidence, the Fifth Circuit agreed with the District Court that the remarks were ambiguous, made by individuals not involved in the discharge decision, and not proximate in time to the discharge decision. (Pet. App. 6a-7a) Additionally, the Fifth Circuit noted that without the benefit of unreasonable inferences favoring Sandstad, the evidence concerning the purpose of the LDP could not be probative of discriminatory animus in the decision to discharge Sandstad two years later. (Pet. App. 10a-13a)

Rejecting Sandstad's contention that *Reeves* required the Court to disregard as "interested witness testimony" all testimony by managers involved in the employment decision, the Fifth Circuit stated that Sandstad's interpretation of *Reeves* "would in effect eliminate his burden to show that [CBRE's] explanation is pretextual. The burden on [CBRE] to produce a legitimate nondiscriminatory reason for terminating [Sandstad] is 'one of production, not persuasion; it can involve no credibility assessment.'" (Pet. App. 8a) (citing *Reeves*, 120 S.Ct. at 2106). The Fifth Circuit also noted that even if the testimony of CBRE's senior managers was excluded from consideration, other evidence in the record supported CBRE's explanation for its decision to discharge Sandstad. (Pet. App. 9a-10a)

The Court then proceeded to address Sandstad's argument that the remarks, previously rejected as direct evidence, constitute some evidence of pretext. (Pet. App. 10a-13a) In doing so, the Fifth Circuit recognized that one of its panels had chosen to apply a test different from the test traditionally utilized by the Court to examine workplace remarks. (Pet. App. 10a n.6) Nevertheless, the Court concluded that "the evidence offered by [Sandstad] would

produce the same result under either test. . . . " *Id.* In holding that comments regarding the purpose of the LDP did not provide any evidence of pretext, the Fifth Circuit acknowledged that such evidence, viewed favorably to Sandstad, "evidences a policy of keeping older employees from advancing to senior management positions. However, the inference that the [LDP] reflected a policy to fire older managers to make room for younger managers is both unreasonable and contradicted by independent, uncontroverted evidence."[6] (Pet. App. 12a)

The Fifth Circuit also rejected Sandstad's argument that he was treated differently from a younger manager. It noted that no formal complaint of gender discrimination had been filed against the younger manager, and agreed with the District Court that any comparison between the treatment of Sandstad and the younger manager would have no probative value. (Pet. App. 13a) The Fifth Circuit also agreed with the District Court that Sandstad had failed to present any evidence that would permit a reasonable inference that CBRE acted differently in its response to other complaints of discrimination. In so doing, the Court noted that Sandstad's evidence amounted to "no more than a list of the employees who have made complaints and a judgment against [CBRE] won by one complainant. The record contains no evidence of the substance of the complaints or actions taken by [CBRE] that would be probative of [CBRE's] attitude toward sex discrimination." (Pet. App. 13a)

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[6] As the District Court noted, "the evidence shows that only two senior managers have been fired since the four years the LDP was announced – plaintiff and another man, whom plaintiff admits was fired for making inappropriate comments during a public meeting." (Pet. App. 25a)

Stating that it had viewed the evidence as a whole and that it had drawn all reasonable inferences in Sandstad's favor, the Fifth Circuit found that "[Sandstad had] created no issue of material fact regarding [CBRE's] discriminatory animus in terminating him," and affirmed the judgment of the District Court. (Pet. App. 14a)

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT IN THE CIRCUITS IN THE METHOD BY WHICH THEY DETERMINE WHETHER THERE IS DIRECT EVIDENCE OF DISCRIMINATION.

Sandstad suggests that this Court should grant certiorari to resolve an alleged conflict between the Fifth Circuit and the Eleventh Circuit regarding the definition of direct evidence in employment discrimination cases. (Petition 8-15) He labels the Fifth Circuit's standard for direct evidence the "dictionary definition" and the standard utilized by another Circuit, the Eleventh Circuit, the "preponderance definition." He then argues that the Eleventh Circuit's standard is more workable and better suited to employment discrimination claims. The difficulty with Sandstad's argument lies in its premise – the direct evidence standards utilized by the Fifth and the Eleventh Circuits, regardless of the label Sandstad wishes to apply, are not in conflict; they are essentially the same.

In *Sandstad*, the Fifth Circuit stated that "[d]irect evidence is evidence that, if believed, proves the fact of discriminatory animus without interference or presumption." (Pet. App. 6a-7a) (citing *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995)). Sandstad suggests, incorrectly, that this is the only standard by which courts within the Fifth Circuit assess whether evidence constitutes "direct evidence" of discrimination. In doing so, he

ignores the fact that the Fifth Circuit has traditionally applied a four-part test or standard, described in *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996), to determine whether remarks related to a protected characteristic are direct evidence of discrimination. Following *Brown*, the District Court noted in its analysis of Sandstad's claimed "direct evidence" that "remarks may serve as sufficient evidence of age discrimination if the offered comments are: 1) age related; 2) proximate in time to the termination; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue." (Pet. App. 23a) (quoting *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996). The four part test in *Brown* has repeatedly been approved by the Fifth Circuit as the appropriate test to determine whether a comment is probative of discrimination. *See, e.g.*, *Auguster v. Vermilion Parish School Bd.*, 249 F.3d 400, 404-05 (5th Cir. 2001).[7] As such, contrary to Petitioner's suggestion, courts within the Fifth Circuit analyze allegedly discriminatory remarks, as did the District Court here, by assessing the nature of the remark, who made the remark, and the relationship between the remark and the employment decision at issue. As noted below, this analysis is essentially the same as the analysis utilized by the Eleventh

[7] We note that in *Sandstad* the Fifth Circuit recognized that one of its panels had chosen to apply a test different than that in *Brown*, a two-part test – "[o]ral statements constitute evidence of discrimination if they indicate age-based animus and the speaker is principally responsible for the plaintiff's firing." (Pet. App. 10a) (citing *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir. 2001)). Nevertheless, the Fifth Circuit concluded that "the evidence offered by [Sandstad] would produce the same result under either test. . . ." (Pet. App. 10a)

Circuit, the only Circuit that Petitioner claims to be in conflict with the Fifth Circuit.[8]

In *Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir. 1999), the Eleventh Circuit attempted to distinguish what it called the "dictionary definition" of direct evidence (which, the Court said, required a direct admission by the decisionmaker that discrimination motivated the decision) from its preferred "preponderance definition" – namely, "evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic." *Id.* at 1301. This standard for direct evidence, while semantically different, is essentially the same as that enunciated by the Fifth Circuit in *Mooney*, *Brown*, and *Russell*. The Eleventh Circuit's requirement that evidence, to be "direct evidence," must establish a causal link between the complained-of action and a protected trait is, in substance, the same as the Fifth Circuit's requirement in *Brown* that remarks, to be evidence of age discrimination in a termination case, must be age related, proximate in time to the termination, made by an individual with authority over the termination decision and related to that decision.[9]

In *Wright*, the Eleventh Circuit examined its precedent and found that while a majority of its courts stated the "dictionary definition" of direct evidence, they were in

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[8] Petitioner contends as follows: "The Circuits split as to the definition of 'direct evidence.' Some Circuits require substantial evidence of discriminatory animus to constitute direct evidence." (Pet. App. 10) However, he cites no authorities for this broad contention other than decisions of the Eleventh and Fifth Circuits.

[9] The same is true with respect to the *Russell* test applied by one panel of the Fifth Circuit.

fact analyzing the evidence under the "preponderance definition." 187 F.3d at 1294. By way of example, *Wright* discussed *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318 (11th Cir. 1998). There, the Eleventh Circuit held that statements did not constitute direct evidence of discrimination because they were made by individuals unconnected with the decision-making process and because the only statement made by a decisionmaker was "removed in both time and subject matter from the contested employment decision." *Id.* at 1330-31. Not surprisingly, these are the same considerations that courts in the Fifth Circuit utilize, per the *Brown* decision, in determining whether statements may constitute direct evidence of discrimination.

Sandstad says that the Fifth Circuit applies a "dictionary definition of direct evidence [that] effectively requires a confession by the decision maker. . . . " (Petition 12) In direct contrast to this statement, he immediately thereafter acknowledges that the Fifth Circuit has applied "in actuality" a preponderance definition, and cites four Fifth Circuit decisions in which the Court found "direct evidence." (Petition 12) Fifth Circuit precedent, as Petitioner acknowledges, clearly reveals that there is no split in the Circuits, and that, in actuality, courts within the Fifth and Eleventh circuits utilize essentially the same considerations in evaluating whether evidence rises to the level of "direct evidence" of discrimination.

Sandstad also suggests that the Fifth Circuit has strayed from the requirement for "direct evidence" set

forth by Justice O'Connor in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). (Petition 11-12) There, in discussing the necessary threshold for direct evidence of discrimination that would trigger a mixed motive analysis, Justice O'Connor, in a concurring opinion, required that the plaintiff produce "direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision." 490 U.S. at 276. Once again, the difficulty with Sandstad's argument lies in its premise – that there is a real difference, as opposed to a semantic difference, between the standard enunciated by Justice O'Connor and the standards utilized by the Fifth Circuit. In fact, however, there is no substantive difference. The *Sandstad* court, and the District Court below, carefully analyzed Petitioner's evidence and concluded, just as the Eleventh Circuit would have concluded, that he failed to present direct evidence of discrimination.

Sandstad argued that the following evidence constituted "direct evidence" of discrimination: 1) a comment approximately two years before he was discharged by an individual not employed by CBRE that there was "too much gray hair in company management," 2) comments regarding the purpose of the Long Term Leadership Development Plan, adopted two years before he was discharged, regarding the identification of younger managers who potentially may be promoted into senior management, and 3) a comment by a non-decisionmaker that Didion, one of the decisionmakers, had chosen, approximately one year before Sandstad was discharged, to "skip a generation" in promoting White to President of Brokerage Services. The District Court, and the Fifth Circuit in *Sandstad*, properly considered this evidence, in conjunction with established Fifth Circuit precedent, and correctly concluded that it did not constitute direct evidence of discrimination. Because none of this evidence would

permit a reasonable trier of fact to find, more probably than not, a causal link between Sandstad's age and his discharge, the same conclusion would be reached utilizing the Eleventh Circuit's standard discussed in *Wright*. Similarly, because none of this evidence could be characterized as direct evidence that age was a substantial factor in his discharge, the same conclusion would be reached utilizing the standard expressed by Justice O'Connor in *Price Waterhouse*.

The fact that the District Court and the Fifth Circuit, in *Sandstad*, did not conclude that Petitioner had presented direct evidence of discrimination does not suggest that the direct evidence standard utilized by the Fifth Circuit is inconsistent with the Eleventh Circuit, or any other Circuit. In principle, and in practice, it is not. In *Reeves,* Justice O'Connor examined an ostensible conflict between the Circuits with respect to the evidence a court is required to consider in ruling on a Fed. R. Civ. P. 50 motion. In doing so, Justice O'Connor stated that "[o]n closer examination, this conflict seems more semantic than real." *Reeves*, 120 S.Ct. at 2110. Similarly, the ostensible conflict between the standards enunciated by the Eleventh Circuit and the Fifth Circuit is more semantic than real. As such, even if the courts below had utilized the *Wright* standard for direct evidence, they would have reached the same conclusion – that Sandstad had failed to offer direct evidence of discrimination.

Clearly, Petitioner's dispute is with the conclusion appropriately reached by both courts below that the evidence he presented was ambiguous, not connected to the decisionmakers and unrelated, both in context and time, to the decision to discharge him, and, thus, did not constitute direct evidence of discrimination. Such a dispute is not remotely worthy of this Court's review.

II. THE FIFTH CIRCUIT'S UNWILLINGNESS TO ADOPT PETITIONER'S INTERPRETATION OF THE *REEVES'* LANGUAGE REGARDING "DISINTERESTED WITNESSES" IS NOT INCONSISTENT WITH *REEVES* AND DOES NOT CREATE A SPLIT IN THE CIRCUITS.

In *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S.Ct. 2097 (2000), this Court explained that courts in entertaining a motion for judgment as a matter of law or for summary judgment, "should review all of the evidence in the record." *Id.* at 2110. This Court also stated that "although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* (citing 9A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2529 p. 299 (2d ed. 1995)). Still relying upon Wright & Miller, this Court further stated as follows:

> That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.*, at 300.

120 S.Ct. at 2110.

Without citing to any precedent, Petitioner urged the Fifth Circuit to accept his own interpretation of the "disinterested witnesses" language, quoted in *Reeves,* from Wright & Miller. Specifically, he urged the Fifth Circuit to conclude that *Reeves* requires courts "to disregard as interested witness testimony *all testimony* by managers involved in the employment decision." (Pet. App. 8a) (*emphasis added*). The Fifth Circuit declined to do so, and specifically recognized that adopting his interpretation would be inconsistent with the well-recognized principle that the burden on an employer to produce a legitimate

nondiscriminatory reason for its employment action is "one of production, not persuasion; it can involve no credibility assessment." (Pet. App. 8a) (quoting *Reeves,* 120 S.Ct. at 2106)). The Fifth Circuit also recognized that adopting Sandstad's interpretation would also, in effect, eliminate his burden to show that CBRE's reasons for discharging him were pretextual. (Pet. App. 8a) As further support for its holding that the "disinterested witnesses" language in *Reeves* could not mean what Petitioner suggests, the Fifth Circuit cited a Seventh Circuit decision, *Traylor v. Brown, et al*, 295 F.3d 783 (7th Cir. 2002), which examined the same language in *Reeves* and reached the same conclusion.

A. There is no split in the Circuits.

Petitioner contends that the Fifth and Seventh Circuits are at odds with every other Circuit as to the meaning of the phrase "disinterested witness" as used in *Reeves*. (Petition 16) Petitioner cites to ten decisions to support this contention, but does not analyze or discuss any of them. (Petition 16 n.7) Reviewing each of the cited cases reveals that none of them conflict with *Sandstad* and that, contrary to his contention, there is no split in the Circuits. In nine of the ten cases, the courts did not comment upon or discuss the meaning of the phrase "disinterested witness;" indeed, in five of the cited cases, there is not even a reference to the phrase "disinterested witnesses."[10]

[10] *See Malacara v. City of Madison*, 224 F.3d 727 (7th Cir. 2000) (the meaning of the phrase "disinterested witness" was not commented upon or discussed); *Armour v. The County of Beaver, Penn.*, 271 F.3d 417 (3d Cir. 2001), *cert. denied*, 122 S.Ct. 1963 (2002) (same); *White v. Burlington Northern & Santa Fe Ruy. Co.*, 310 F.3d 443 (6th Cir. 2002), *rehearing en banc granted, judgment vacated*, ___ F.3d ___, 2003 WL

(Continued on following page)

Further, Petitioner goes so far as to represent to this Court that the Circuit Courts referenced at p. 16 n.7 of the Petition, "disregard[ed] the testimony of interested witnesses," (Petition 17), when, in fact, none of the decisions cited by Petitioner include any references to testimony being disregarded because it emanates from an "interested witness."

Other than *Traylor* and *Sandstad*, which reject Petitioner's interpretation of the "disinterested witnesses" language in *Reeves*, the only case cited by Petitioner which addresses, albeit in passing, the meaning of that language is *Wilcox v. State Farm Mut. Automobile Ins. Co.*, 253 F.3d 1069 (8th Cir. 2001). In *Wilcox*, the plaintiff argued that because his supervisor "worked for State Farm he was not a disinterested witness . . . [and his] affidavit should have been ignored." 253 F.3d at 1070. The Eighth Circuit rejected this argument, suggesting that the Supreme Court in *Reeves* "was intimating that there are some cases in which uncontroverted testimony from an interested party could be given credence. . . . " 253 F.3d at 1070-71. It then stated:

548883 (6th Cir. Feb. 11, 2003) (same); *Winarto v. Toshiba America Electronics Components, Inc.*, 274 F.3d 1276 (9th Cir. 2001), *cert. dism'd*, 123 S.Ct. 816 (2003) (same). *See also Fester v. Farmer Bros. Co.*, 49 Fed. Appx. 785, 2002 WL 31323499 (10th Cir. Oct. 17, 2002) (the meaning of the term "disinterested witness" was not commented upon or discussed and, moreover, that term never even appeared in the case); *Mickle v. Morin*, 297 F.3d 114 (2nd Cir. 2002) (same), *EEOC v. Bd. of Regents of the Univ. of Wisconsin System*, 288 F.3d 296 (7th Cir. 2002) (same), *Warren v. Prejean*, 301 F.3d 893 (8th Cir. 2002) (same) and *Swenson v. Potter*, 271 F.3d 1184 (9th Cir. 2001) (same).

> It would seem to us that in this case, where Mr. Wilcox was given a clear opportunity to contradict [his supervisor's] affidavit but did not, it would not be obvious error to include the affidavit's contents in the factual mix relevant to summary judgment. In any event, we think that it is unnecessary to decide the question because the record contains insufficient evidence to support an inference that State Farm's proffered reason for terminating [the employee] was pretextual even if [his supervisor's] affidavit is put aside.

253 F.3d at 1071. As such, *Wilcox* does not conflict with the holdings in *Traylor* and *Sandstad.*

Additionally, close to the time the Petition was filed, the Sixth Circuit issued an unpublished decision that is consistent with the only two other courts that have squarely addressed the issue – *Sandstad* and *Traylor. Almond v. Abb Industrial Systems, Inc.*, 2003 WL 173640 (6th Cir. January 22, 2003) (unpublished). In *Almond*, the Sixth Circuit rejected the argument that when "considering a motion for summary judgment, the court must entirely ignore all testimony by witnesses associated with the employer." *Almond*, 2003 WL 173640 at *2. The Court noted that this argument "both over-reads *Reeves* and leads to absurd consequences. If plaintiffs were correct, there could be no summary judgment for the defendant after the plaintiff makes a prima facie case as the defendant's proffered non-discriminatory reason by necessity has to be provided by defendant's witnesses." *Almond*, 2003 WL 173640 at *2, citing, *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir.1994) and *Reeves*, 120 S.Ct. 2109-10 (contemplating that at least some evidence provided by the employer may be considered on summary judgment). There is not, as Petitioner suggests, a split in the Circuits.

B. *Reeves* does not require courts to disregard all testimony by managers involved in the employment decision at issue.

Petitioner states, "[i]n using the term 'disinterested witnesses' in *Reeves*, the Court must have meant something," (Petition 18), and then suggests that what this Court must have meant is that any manager involved in the employment decision necessarily is an "interested witness" and his or her testimony must be disregarded. (Petition 16-18) He then presumptuously concludes that if this Court did not mean what he suggests it meant, then "as a practical matter, there is no such thing as an 'interested witness' for purposes of employment discrimination cases." (Petition 18)

However, Petitioner's interpretation would have the ridiculous effect of preventing an employer, in most instances, from offering the reason for the challenged employment decision. This would be directly at odds with this Court's recognition, in *Reeves*, that "the employer is in the best position to put forth the actual reason for its decision." 120 S.Ct. at 2109. Petitioner's suggestion is also at odds with the manner by which this Court, in *Reeves*, considered the summary judgment evidence offered by Reeves and by his employer. Immediately after discussing the appropriate standard by which to review such evidence, Justice O'Connor proceeded to apply that standard to the evidence. 120 S.Ct. at 2110. In so doing, Justice O'Connor did not indicate that the Court was required, as Petitioner suggests, to disregard the testimony of Sandra Sanderson, the company president who discharged Reeves. To the contrary, such testimony was specifically referenced

and obviously considered by this Court.[11] 120 S.Ct. at 2111. (" . . . Sanderson testified that she fired Petitioner because he had 'intentionally falsif[ied] company pay records. . . . '").

Moreover, Wright & Miller, the authority quoted by *Reeves* for the proposition that courts should give credence to evidence supporting the movant at least to the extent that it comes from "disinterested witness," also states that under some circumstances even the testimony of an interested witness "must be believed," 9A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2527, at 287-88 (2d ed. 1995), and that "[t]he testimony of an employee of the [movant] must be taken as true when it disclosed no lack of candor, the witness was not impeached, his credibility was not questioned, and the accuracy of his testimony was not controverted by evidence, although if it were inaccurate it readily could have been shown to be so." *Id.* at 287 n.9 (citing *Chesapeake & Ohio R.R. v. Martin*, 283 U.S. 209 (1931)). In *Chesapeake & Ohio R.R.*, this Court stated that testimony of the moving party that "is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and . . . is not opposed to the probabilities, nor, in its nature, surprising or suspicious, [need not be] den[ied] conclusiveness." *Chesapeake & Ohio R.R.*, 283 U.S. at 218. As such, Wright & Miller clearly does not embrace Petitioner's suggestion that all testimony of managers involved in the employment decision at issue must be ignored by the courts.

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[11] That Reeves was able to show that the reason offered by Sanderson in her testimony was pretextual does not alter the fact that such testimony was, contrary to Petitioner's suggestion, properly considered in this Court's analysis of Reeves' pretext claim.

Just as this Court properly considered the testimony of the company president as to why she discharged Reeves, the Fifth Circuit and the District Court properly considered the testimony of CBRE's managers explaining the legitimate, nondiscriminatory reasons why Petitioner was discharged.

C. Even if the courts below were to disregard the testimony of the managers involved in the decision to discharge Petitioner, as he urges, Respondent offered substantial evidence, in addition to testimony evidence, supporting its reasons for discharging him.

Petitioner notes that "[t]he Fifth Circuit in *Sandstad* did not suggest anyone who could possibly be an 'interested witness' in an employment discrimination case if the managers involved in the employment decision do not fit this definition." (Petition 19) However, the Fifth Circuit was not required to do so in this case because, as noted in *Sandstad,* "the record reveals support other than the testimony of senior managers for [CBRE's] explanation." (Pet. App. 9a) Specifically, the Fifth Circuit recognized that the legitimate, nondiscriminatory reason offered by CBRE for discharging Sandstad was supported by evidence other than testimony of the decisionmakers and that such evidence included interview summaries authored by the attorney hired to investigate Petty's complaint, a written performance review of Sandstad, memoranda concerning Sandstad authored by individuals who reported directly to him, memoranda authored by Sandstad, and even Sandstad's deposition testimony. (Pet. App. 9a) As such, even if the courts below had disregarded the

testimony of the managers who discharged Sandstad, Respondent clearly met its burden of producing a legitimate nondiscriminatory reason for the discharge.[12]

Because there is no split in the Circuits regarding the meaning of the "disinterested witnesses" language in *Reeves*, because that language clearly does not mean, as urged by Petitioner, that testimony from any manager involved in the challenged employment decision must be disregarded, and because CBRE produced substantial evidence, other than testimony from the decisionmakers, supporting its legitimate, nondiscriminatory reason for discharging Sandstad, review of this question presented is neither necessary nor warranted.

III. THE FIFTH CIRCUIT DID NOT HOLD THAT COURTS, IN DECIDING A CASE OF INDIRECT DISCRIMINATION, MAY DETERMINE THE CREDIBILITY OF AN EMPLOYER'S EXPLANATION OF THE CHALLENGED DECISION.

Sandstad suggests, at pp. 20-22 of the Petition, that the Fifth Circuit, in *Sandstad*, disagreed with the mandate in *Reeves* that in the context of examining circumstantial evidence of discrimination, credibility determinations are

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[12] The purpose of Petitioner's reference to four hypothetical fact scenarios is unclear. (Petition 18-19) It does appear that Petitioner is suggesting that *Reeves* stands for the proposition that the employer in fact scenarios (1) and (3) could not even explain why it fired the plaintiff. Clearly, such a suggestion is nonsensical and inconsistent with this Court's holding that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains *at all times* with the plaintiff." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (*emphasis added*), quoted in *Reeves*, 530 U.S. at 143.

jury functions, not those of a judge. This clearly is not the holding of the Fifth Circuit. Indeed, in discussing the standard of review, *Sandstad* cites *Reeves* for the proposition that "[i]n reviewing the evidence, we must draw all reasonable inferences in favor of the nonmoving party, and *avoid credibility determinations* and weighing of the evidence." (Pet. App. 4a-5a) (citing *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2110 (2000) (*emphasis added*)). Following this dictate, both lower courts made no credibility determinations with respect to the reason offered by Respondent for discharging Sandstad. Rather, in addressing Sandstad's claimed evidence of pretext, both courts viewed the evidence with all reasonable inferences favoring Sandstad and concluded, properly, that he had failed to offer any evidence of pretext.

Petitioner suggests, illogically, that the Fifth Circuit's citation to two Seventh Circuit decisions necessarily means that the Fifth Circuit, contrary to *Reeves*, "[empowers] judges to make credibility determinations of a defendant's explanation of the discharge at issue." (Pet. App. 20-21) It is disingenuous, at best, to suggest that by citing two decisions from another Circuit, neither of which suggests that credibility determinations may be made by the trial court, the Fifth Circuit has now adopted a position that is inconsistent with *Reeves* and also with its recognition, earlier in the *Sandstad* decision, that it "*must . . . avoid credibility determinations. . . .* " (Pet. App. 4a-5a)

Sandstad cited both Seventh Circuit decisions in the context of its examination of Sandstad's contention that "*Reeves* requires us to disregard as interested witness testimony all testimony by managers involved in the employment decision." (Pet. App. 8a) The Fifth Circuit disagreed and stated as follows:

> The definition of an interested witness cannot be so broad as to require us to disregard testimony from a company's agents regarding the company's reasons for discharging an employee. As the Seventh Circuit noted in *Traylor v. Brown, et al*, 295 F.3d 783 (7th Cir. 2002), to so hold would foreclose the possibility of summary judgment for employers, who almost invariably must rely on testimony of their agents to explain why the disputed action was taken.

(Pet. App. 9a) Throwing logic out the window, Petitioner, after quoting the above language, states "[t]he candid announcement that the Fifth Circuit (and the Seventh Circuit) want to make credibility determinations to safeguard the possibility of summary judgment for employers is (1) no basis for defying an express holding of this Court and (2) flawed reasoning." (Pet. App. 20) Clearly there was no such "announcement," candid or otherwise.

The Fifth Circuit quoted another Seventh Circuit decision, *Futrell v. J.I. Case*, 38 F.3d 342 (7th Cir. 1994), as further support for its disagreement with Petitioner's interpretation of the "disinterested witnesses" language in *Reeves*. (Pet. App. 8a-9a) *Sandstad* stated that Petitioner's interpretation of *Reeves* – that courts must disregard as interested witness testimony all testimony by managers involved in the employment decision – "would in effect eliminate his burden to show that [the employer's] explanation is pretextual. The burden on [the employer] to produce a legitimate nondiscriminatory reason for terminating [plaintiff] is 'one of production, not persuasion; it can involve no credibility assessment.'" (Pet. App. 8a) (citing *Reeves*, 120 S.Ct. at 2106 and quoting *Futrell v. J.I. Case*, 38 F.3d 342 (7th Cir. 1994)).

Petitioner presumably contends that the quoted language from *Futrell* indicates that courts are free to

make credibility determinations. It does not. The language from *Futrell*, quoted by the Fifth Circuit in *Sandstad,* is as follows:

> "[I]n indirect discrimination cases, we do not defer to jury verdicts where the credibility of a defendant's explanation of the discharge is at issue *simply because juries have the exclusive right to judge credibility*."

(Pet. App. 8a-9a) (*emphasis added*). The *Futrell* court was merely stating that an employee claiming discrimination cannot avoid summary judgment simply by arguing that a jury is entitled to disbelieve the employer's explanation. Indeed, the message of the language in *Futrell* is entirely consistent with the circumstantial method of proof – requiring an employee to present additional evidence once the employer has met its burden of producing a legitimate nondiscriminatory reason – set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1975). *Futrell* clearly does not say, as Petitioner suggests, that courts are free to make credibility determinations concerning a defendant's explanation for the employment decision at issue, and the Fifth Circuit's reliance upon *Futrell* similarly does not suggest, in any way, that this is, or has ever been, a holding of the Fifth Circuit.[13]

In addition to misreading *Futrell*, Petitioner quotes language from the *Futrell* decision that was neither quoted nor referenced by the Fifth Circuit in *Sandstad*. He then implies, without any basis for doing so, that the Fifth Circuit is in agreement with the additional language he

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[13] For this reason, Petitioner's suggestion, at p. 21 of the Petition, that there is a split in the Circuits has no merit.

chose to quote from *Futrell*.[14] (Pet. 21-22) Petitioner's suggestion that the *Sandstad* court adopted or agreed with language from another circuit court that was neither quoted nor referenced in the *Sandstad* decision is, quite clearly, neither justified nor warranted.

Because the Fifth Circuit has not held that credibility determinations may be made by the court in assessing an employer's reason for the challenged employment decision, and because no such credibility determination was made by the District Court or by the Fifth Circuit in *Sandstad*, review of this additional question presented is unnecessary.

CONCLUSION

For the reasons set forth above, this case raises no issue worthy of review by this Court. Respondent respectfully requests, therefore, that the petition for writ of certiorari be denied.

Respectfully submitted,

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[14] We note that the additional *Futrell* language quoted by Petitioner – "If the evidence does not amply support a plaintiff's claim that the defendant's explanation is unworthy of credence, judgment as a matter of law is entirely appropriate" – says nothing about courts making credibility determinations.